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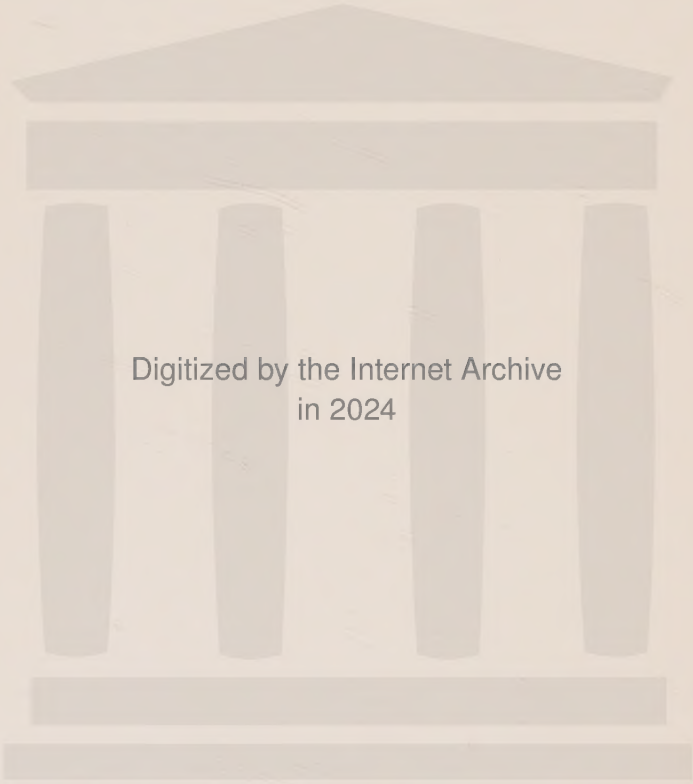
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[1919] Appeal Cases

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1919.

THE

LAW REPORTS

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HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

REPORTERS.

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Privy Council . . . . A. M. TALBOT, *Barrister-at-Law.*

1919.

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JUDGES AND LAW OFFICERS.

MEMORANDA.

1919.

Jan. 14. *The Great Seal was delivered to the* Right Hon. Sir Frederick Edwin Smith, K.C.

Jan. 30. The Right Hon. Sir Gordon Hewart, K.C., *was appointed His Majesty's Attorney-General.*

Sir Ernest Murray Pollock, K.B.E., K.C., *was appointed His Majesty's Solicitor-General.*

Feb. 3. The Right Hon. Sir Frederick Edwin Smith, Lord Chancellor, *was created a Baron of the United Kingdom by the name of Baron Birkenhead, of Birkenhead, in the County of Chester.*

Feb. 14. Mr. Justice Paul Ogden Lawrence *was knighted.*

March 8. The Hon. Sir James Richard Atkin, *one of the Justices of the High Court of Justice, was appointed a Lord Justice of Appeal.*

Frederick Arthur Greer, Esq., K.C., *was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

April 4. The Right Hon. Robert Bannatyne, Baron Finlay, *was created a Viscount of the United Kingdom by the name of Viscount Finlay, of Nairn, in the County of Nairn.*

April 21. The Right Hon. Sir Henry Bargrave Deane, *formerly one of the Justices of the High Court of Justice, died at* 52, *Eaton Place, London, S.W., aged* 72 *years.*

Oct. 31. The Right Hon. Sir Charles Swinfen Eady *having resigned his office, the* Right Hon. William Lord Sterndale, *the President of the Probate, Divorce and Admiralty Division of the High Court of Justice, was appointed Keeper and Master of the Rolls and Records of the Chancery of England.*

The Right Hon. Sir Henry Edward Duke, *one of the Lords Justices of Appeal, was appointed President of the Probate, Divorce and Admiralty Division of the High Court of Justice.*

The Hon. Sir Robert Younger, *one of the Justices of the High Court of Justice, was appointed a Lord Justice of Appeal, and was afterwards sworn of the Privy Council.*

The Hon. Frank Russell, K.C., *was appointed one of the Justices of the High Court of Justice.*

Nov. 1. The Right Hon. Sir Charles Swinfen Eady, *late Keeper and Master of the Rolls and Records of the Chancery of England, was created a Baron of the United Kingdom by the name of Baron Swinfen, of Chertsey, in the County of Surrey.*

Nov. 15. The Right Hon. Lord Swinfen, *late Keeper and Master of the Rolls and Records of the Chancery of England, died at* 23, *Hyde Park Gardens, London, W., aged* 68 *years.*

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OF THE

JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY IN COUNCIL.

1919.

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Lord *Buckmaster*. }
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Sir *Arthur Channell*.
Sir *James Rose-Innes*, K.C.M.G.
Sir *Lawrence Jenkins*, K.C.I.E.
Sir *Louis Henry Davies*, K.C.M.G.
Mr. Justice *Duff*.

And those other members of the Privy Council who are within the provisions of the statutes 3 & 4 Will. 4, c. 41, 44 Vict. c. 3, and 50 & 51 Vict. c. 70.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

NEW ZEALAND SHIPPING COMPANY, LIMITED. . . . . } APPELLANTS;

AND

SOCIÉTÉ DES ATELIERS ET CHANTIERS DE FRANCE. . . . . } RESPONDENTS.

H. L. (E.)*
1918
April 25.

Contract—Construction—Contract to be "Void" in a certain Event—Void or Voidable.

By a contract made in 1913 a French company (called the builders) agreed to construct a steamer for a shipping company (called the purchasers) to be completed by January 30, 1915, subject to an extension of time if the construction was delayed by an unpreventable cause beyond the control of the builders; and in case the builders should be unable to deliver the steamer within, in the event of France becoming engaged in a European war, eighteen months from the date agreed by the contract for completion, "thereupon this contract shall become void and all money paid by the purchasers shall be repaid to them" with interest at 5 per cent.

---

* *Present:* LORD FINLAY L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD WRENBURY.

H. L. (E.)

1918

NEW ZEALAND SHIPPING COMPANY v. SOCIÉTÉ DES ATELIERS ET CHANTIERS DE FRANCE.

On August 2, 1914, while the steamer was in course of construction, France became engaged in a European war, and had ever since continued to be so engaged; and the builders had been prevented by unpreventable causes beyond their control from completing the steamer by January 30, 1915, and had ever since been prevented by the same causes. On the expiration of the eighteen months on July 30, 1916, the question arose whether the builders were entitled to treat the contract as null and void, notwithstanding that the purchasers required the builders to complete and deliver the vessel.

Held, that the contract became void and not merely voidable at the option of the purchasers, and that as the avoidance of the contract had not been brought about by any wrongful act or default on the part of the builders, the latter were not precluded from alleging that the contract was void.

A stipulation in a contract that it shall be void in a certain event is to be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of his own wrong or, *semble*, of an event brought about by his own act or omission.

Decision of the Court of Appeal [1917] 2 K. B. 717 affirmed.

APPEAL from a decision of the Court of Appeal (Viscount Reading C.J., Pickford L.J., and Scrutton L.J.) (1) affirming a decision of Bailhache J. upon an award stated by an umpire in the form of a special case.

The dispute between the parties arose under a contract dated March 6, 1913, between the appellants as purchasers and the respondents as builders, whereby the respondents agreed to construct a steamer for the appellants on the terms and conditions therein mentioned.

The terms of the contract and the facts which gave rise to the dispute are fully stated in the report of the case before the Court of Appeal and in the judgment of the Lord Chancellor.

1918. March 19, 21, 26. *Leck*, *K.C.*, and *Simey* for the appellants.

1. Upon the true construction of this contract the date of completion had not arrived at the date of the award. Clause 5 of the contract provides for an extension of the time for completion where the construction is delayed by any unpreventable cause beyond the control of the builders, and the date of completion cannot be ascertained until the extension of time provided by that clause has been exhausted.

2. Clause 12, which provides for the avoidance of the

(1) [1917] 2 K. B. 717.

contract in certain events, is a stipulation in favour of the purchasers, the appellants, and the contract does not become automatically void on the happening of those events, but is voidable at the option of the appellants. Any other construction of the clause would enable the builders to treat the contract as void, although the event was brought about by their own default. But that is contrary to the well established principle of law that a provision for the avoidance of a contract will not be so construed as to enable one of the parties to take advantage of his own wrong: *Rede* v. *Farr* (1); *Doe* v. *Bancks* (2); *Hughes* v. *Palmer*. (3)

Douglas Hogg, K.C. (with him *F. T. Barrington Ward* and *Captain Jacques Quartier*, E.M.A. French Army), for the respondents (called upon as to the second point only).

In all cases where "void" has been construed as "voidable," at the option of one of the parties, the ground for adopting that construction is that a party shall not be entitled to take advantage of his own wrong; but here the respondents have committed no wrong, and therefore there is no ground for construing the stipulation for avoidance otherwise than in its natural and ordinary meaning: *Grey* v. *Pearson* (4); *Hughes* v. *Palmer* (5); *Magdalen Hospital* v. *Knotts*. (6)

Leck, K.C., replied.

The House took time for consideration.

April 25. LORD FINLAY L.C. My Lords, this is an appeal from the decision of Bailhache J. upon an award stated in the form of a Special Case for the opinion of the Court.

The appellants agreed to purchase from the respondents a steamship to be constructed for them by the respondents in terms of a contract dated March 6, 1913. The price was to be 98,450*l*., payable by instalments. The clauses material for the purpose of this appeal are set out in the Special Case, and are as follows: "5. The said steamer unless the construction thereof shall be delayed by fire, strike, or lock-out of workmen, or any other unpreventable cause beyond the control of the

(1) (1817) 6 M. & S. 121.
(2) (1821) 4 B. & Al. 401.
(3) (1865) 19 C. B. (N. S.) 393.
(4) (1857) 6 H. L. C. 61, 106.
(5) 19 C. B. (N. S.) 393, 405.
(6) (1879) 4 App. Cas. 324, 332.

H. L. (E.) 1918 — NEW ZEALAND SHIPPING COMPANY v. SOCIÉTÉ DES ATELIERS ET CHANTIERS DE FRANCE. — Lord Finlay L.C.

Builders (in which case a fair proportionate extension of time shall be allowed), shall be completed ready for trial by the 30th October, 1914, and delivered afloat as usual in the port of Dunkirk free of dock and other dues as soon as such trial has been completed to the satisfaction of the Purchasers or their representatives." "7. In the event of the said vessel not being completed and ready for trial on or before 30th October, 1914, ... the Builders undertake to pay the Purchasers as liquidated damages the sum of 10*l.* per working day for each working day during which such delivery may be delayed beyond the 30th October, 1914, unless such delay is due to any of the causes specified in clause 5 hereof. . . ." "12. In case the Builders become bankrupt or insolvent or shall fail or be unable to deliver the steamer within eight months from the date agreed by this contract, thereupon this contract shall become void and all money paid by the Purchasers shall be repaid to them with interest accrued thereupon at 5 per cent., and that without it being necessary for the Purchasers to take any legal action for the recovery of this money. The Builders will hand to the Purchasers the guarantee of a Bank who will undertake to repay this money in the event of its becoming due as stated above. Except only in the event of France becoming engaged in a European war, then the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all."

The date, January 30, 1915, was subsequently substituted in the contract for October 30, 1914, as the date by which the vessel was to be completed ready for trial.

The vessel was in course of construction when on August 2, 1914, France became engaged in the present European war. It is found as a fact in the Special Case that the builders were prevented by unpreventable causes beyond their control within the meaning of clause 5 from completing the vessel ready for trial by January 30, 1915, and had ever since been prevented by the same causes.

It was contended by the respondents—the builders—that the eighteen months mentioned in clause 12 began to run on

January 30, 1915, and therefore expired on July 30, 1916, while the appellants—the building owners—contended that the eighteen months would not begin to run until the builders were in default on the expiration of the extension of time allowed by clause 5 in case of delay caused by unpreventable causes. It was further contended by the respondents, the builders, that in the events which have happened the contract became void on July 30, 1916, while the appellants—the building owners—contended that on the true construction of clause 12 it was voidable at *their* option only.

The umpire decided by his award that the eighteen months expired on July 30, 1916, and that the builders in the events which have happened are entitled to treat the contract as null and void. The questions for the opinion of the Court are whether his decision on these two points was right. Bailhache J. held that the umpire was right upon both points, and the Court of Appeal took the same view. I agree with the Courts below in thinking that the umpire was right on both points.

The first point appears to me to be very clear. The words " the date agreed by this contract " in clause 12—or, as in the French version, " la date de livraison fixée par ce contrat "—denote, in my opinion, January 30, 1915. That is the only date specified for completion in the contract. It is true that an extension of time beyond that date is provided for by clause 5 in the case of delay due to fire, strikes, or lock-outs of workmen, or any other preventable cause beyond the control of the builders, in which case a fair proportionate extension of time was to be allowed. But neither in the English nor in the French version do the words of clause 12 appear to be apt to denote the expiration of the extension to be allowed in respect of such unavoidable delay. Clause 5 fixes no date for the expiration of the extension, but provides that the extension is to end when the cause of delay ceases to operate. The date mentioned in clause 12 as that from which the eight months or eighteen months were to run is obviously that specified in clause 5—namely, January 30, 1915.

Upon the second point I also agree with the umpire and with the Courts below. It appears upon the facts found on the

H. L. (E.) 1918 — NEW ZEALAND SHIPPING COMPANY v. SOCIÉTÉ DES ATELIERS ET CHANTIERS DE FRANCE. — Lord Finlay L.C.

Special Case that the builder was in no degree responsible for the delay which took place in completion, and that it was due entirely to causes beyond his control covered by clause 5 in the contract. Under these circumstances I think that the builder is entitled to say that under clause 12 the contract became void when the eighteen months expired. Clause 12 deals with four different cases : (*a*) Bankruptcy of the builder. (*b*) Insolvency of the builder. (*c*) Failure of the builder to deliver. (*d*) Inability of the builder to deliver. It seems to me clear that the builder could not say that the contract was void in consequence of his own bankruptcy or insolvency, as for this he would be as between himself and the building owners responsible, even if the bankruptcy or insolvency were entirely due to unavoidable misfortune. Nor could the builder claim a right to treat the contract as void in case of his failure to deliver—the word used in the French version is " refus "—and a breach of contract, whether by actual refusal or omission to perform, cannot confer any right upon the person in default. The fourth case provided for inability—in the French the word used is " impossibilité "—and might be due to failure on the part of the builder to proceed with the construction with due diligence, in which case the builder could not claim release from the contract under this clause. On the other hand, the inability may have been the result of causes beyond the control of the builder, for which he is not, under the terms of the contract, to be held liable.

It is a principle of law that no one can in such case take advantage of the existence of a state of things which he himself produced. This is illustrated by the case of *Roberts* v. *Wyatt*. (1) There the plaintiff had purchased an estate, and it was provided in the contract that the vendors should make out a good title, and on or before December 21, 1808, on receiving from the plaintiff the purchase-money, execute a legal conveyance of the fee-simple. There was a proviso that " in case the vendors could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or if the purchaser should not pay the purchase money on the appointed day,

(1) (1810) 2 Taunt. 268, 276.

the agreement should be utterly void." An abstract was sent to the plaintiff by the defendant, who was the vendors' solicitor. The abstract was sent back to the defendant for the purpose of having the title cleared up. The defendant said that the objections to the title could not be met, and refused to return the abstract, asserting that the contract was void under the proviso. Sir James Mansfield, Chief Justice, in the course of his judgment said: "Something has been argued on the construction of the proviso that in case the vendor could not make a title, the contract should be void. But in order to adapt that defence to the present case, the argument must be, that if the defendant *says* he cannot answer the objections, it shall be absolutely void at the choice of either party. But that is not so: the meaning is, that if the seller cannot make a good title by the time mentioned, the contract shall be void as against him, and the plaintiff has a right to be off his bargain. So, e contrà, if the plaintiff does not pay the money, the defendant may avoid the contract; but the plaintiff cannot say, I am not ready with my money, therefore I will avoid the contract; nor can the seller say, my title is not good, therefore I shall be off. And the word is, 'if they *cannot* make,' so it must appear by sufficient proof that they cannot make a title." Lord Ellenborough in *Rede* v. *Farr* (1) applied the same principle to a case in which it was alleged that a lease became void by the failure of the lessee to pay the rent. I may quote the following sentences from his judgment: "In this case, as to this proviso, it would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong, if we were to hold that a lease, which in terms is a lease for twelve years, should be a lease determinable at the will and pleasure of the lessee; and that a lessee by not paying his rent should be at liberty to say that the lease is void. On this principle, even if it were not borne out so strongly as it is by the current of authorities, it would be sufficient to hold that the lease was only void as against the lessee, not against the lessor. In Co. Litt. 206b it is laid down: 'If a man make a feoffment in fee, upon condition that the

(1) (1817) 6 M. & S. 121, 124.

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feoffee shall re-infeoff him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute; for the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. And so it is if A. be bound to B. that J. S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be performed. And this is regularly true in all cases.' If that be a principle of law, that a party shall not take advantage of his own wrong, then a lessee shall not avail himself of his own act to vacate his lease." If it had been the case here that the builder was—to use Lord Coke's language—" himself the mean " that the vessel was not completed within the eighteen months, he could not say that the contract had thereby become void. But, as the umpire has found, the non-completion was not in any way brought about by the builder, but was the result of causes for which under the contract he is not responsible.

Questions of this sort have often arisen in case of provisions that a lease should be void on non-payment of rent or non-performance of covenants by the lessee. It has always been held that the lessee could not take advantage of his own act or default to avoid the lease, and the expression generally employed has been that such proviso makes the lease voidable by the lessor, or void at the option of the lessor. The decisions on the point are uniform, and are really illustrations of the very old principle laid down by Lord Coke (Co. Litt. 206b) that a man shall not be allowed to take advantage of a condition which he himself brought about. In the present case the builder was in no way responsible for the non-completion within eighteen months, and there is no reason why clause 12 should not be interpreted according to the natural meaning of the words so as to render the contract void.

For these reasons I agree with the decision of the Court of Appeal, and think that this appeal should be dismissed with costs.

LORD ATKINSON. My Lords, I cannot but think that the contest in this case is upon the main point very much a contest about names.

It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the thirtieth day after the date of the contract, the contract should be void. Then if rain did fall on that day the contract would be put an end to by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract.

The application to contracts such as these of the principle that a man shall not be permitted to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulation that the contract shall be void on the happening of the named event. To deprive him of that option would be but to effectuate the purpose of the blameable party. When this option is left to the blameless party, it is said that the contract is voidable, but that is only another way of saying that the blameable party cannot himself have the contract made void, cannot force the other party to do so, and cannot deprive the latter of his right to do so. Of course, the parties may expressly or impliedly stipulate that the contract shall be voidable at the option of either party to it. I am not dealing with such a case as that.

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It may well be that the question whether the particular event upon the happening of which the contract is to be void was brought about by the act or omission of either party to it may involve a determination of a question of fact.

On the first point I think that the words " date agreed by this contract " in article 12 of the agreement meant originally for all practical purposes October 30, 1914, and now by the addition which has been made to the contract means July 30, 1916, when the further eighteen months given for the completion of it expired. I do not think that it can mean the termination of the further period allowed as a fair proportionate extension for completion under article 5 of the agreement. That is a quite indefinite period. The parties might disagree as to its duration, and, if so, the dispute would be a matter for arbitration within the thirteenth article of the agreement, since it would be a dispute " touching the completion of the steamer " and the construction or meaning of the contract. This delay might be much prolonged.

Under article 12 several of the events, the happening of any one of which is to render the contract void, are clearly events for which the builders are responsible, or over which they have control—namely, the event of their bankruptcy, the event of their insolvency, or the event of their refusal (refus) to deliver the steamer, the event of their inability (impossibilité) to deliver her, might be the result of the neglect of the builders to begin to build her soon enough, or to keep a sufficient staff at work upon her. In such a case the event, the happening of which is to make the contract void, would be brought about by their act or omission, and they could not avail themselves of it. But the umpire has found as a fact that the builders were prevented by unavoidable causes beyond their control from completing the vessel ready for trial on January 30, 1915. The two parties therefore are equally blameless. By the act or omission of neither has the event been brought about on the happening of which the contract was to become void. The principle that a man shall not take advantage of his own wrong does not apply, and the contract becomes null and void absolutely,

as its words in their natural meaning provide that it should. In my opinion the order appealed from was right, and this appeal should be dismissed with costs here and below.

LORD SHAW OF DUNFERMLINE. My Lords, by contract and supplementary agreement of parties the respondents undertook to build a steamship for the appellants and to have her ready for trial by January 30, 1915. By the fifth clause of the contract it was agreed that if the stipulation as to time for completion could not be complied with, by reason of causes beyond the control of the builders, the time should be extended in proportion to the delay so caused. By the twelfth clause of the contract it was provided as follows : " In case the Builders become bankrupt or insolvent or shall fail or be unable to deliver the steamer "—these words in the French version are " ou de leur refus ou impossibilité de livrer le vapeur "—" within eight months from the date agreed by this contract, thereupon this contract shall become void and all money paid by the Purchasers shall be repaid to them with interest." In this clause the following interpolation was inserted : " Except only [in the French version " cependant "] in the event of France becoming engaged in a European war, then the above limit of eight months shall be extended equal to the duration of the said war, but in no case to exceed eighteen months in all." As to the running of time under these clauses, it appears to me to be clear that both the eight months and the eighteen months ran from a fixed point—namely, January 30, 1915—and I am further of opinion that, with reference to the extended period of eighteen months, the contract has definitely stated that period as the maximum of prolongation. By reason, however, of the outbreak of the European war the building of the ship has been still further delayed, and the ship is still incomplete. A state of affairs has accordingly arisen for which neither party is responsible which is covered by clause 12 of the contract. " Thereupon," says clause 12, " this contract shall become void."

The arbitrator decided " that the builders in the events which have happened are entitled to treat the contract as null and void (except for the repayment with interest of 5 per cent. of

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all moneys already paid to the builders by the purchasers)." In my opinion this judgment was right, and has been properly upheld by the Courts below.

The attack upon these judgments was centred upon this, that the terms employed—namely, that the contract " shall become void "—must be taken to mean that the contract was voidable only at the instance of the building owner. According to the agreement that owner might say : " Although the stipulated time for delivery is and may be long exceeded, I am willing to suffer the delay ; and I do not choose to found upon the stipulation : accordingly you the builder must—along with us—remain bound, so long as I choose." The answer to the whole of this is clearly put by Bailhache J.—that the stipulation as to the contract becoming " void " is a stipulation in favour of both parties. This is subject only to this, that the conduct or situation of the party treating the contract as void shall not have been the means whereby the event which gives rise to the condition has been brought about. What I have ventured last to express appears to me to be sound in principle and to be a better and broader expression of the principle than a reference to either a party's own wrong or a party's own default, for without either definite wrong or default the action, or even the situation, of one of the parties may be sufficient to produce the condition. I prefer more than any other as an expression of the principle that which occurs in Coke upon Littleton (1), and is quoted with approval by Lord Ellenborough in *Rede* v. *Farr* (2), " for that he himself is the mean that the condition could never be performed." As to authority, I refer in particular to Lord Ellenborough's judgment in *Rede* v. *Farr* (3), to *Doe* v. *Bancks* (4), and to *Hughes* v. *Palmer*. (5)

When a contract describes an event or events which may happen, and declares that on the occurrence of any of these the contract shall become void, the results may be tabulated thus : (1.) Such a contract may be declared void, as said, at the instance

(1) 206b.
(2) 6 M. & S. 125.
(3) 6 M. & S. 121.
(4) 4 B. & Al. 401.
(5) 19 C. B. (N. S.) 393.

of that party who has not by his own wrong or default brought about the event, or, in Coke's words, has not been "the mean that the condition could never be performed." (2.) Therefore, such a contract is voidable (*a*) sometimes by one party—for instance, a builder who has not been able to proceed on account of the default of the building owner, say, by failure to pay the stipulated instalments of price, and (*b*) sometimes by the other party—for instance, the building owner, where the bankruptcy of the builder has prevented timeous completion or delivery. (3.) And such contracts are voidable by both or either when the impossibility to complete or deliver was something for which neither was responsible. Each party is innocent, neither is in default: the conduct of neither has brought about the event, and in such a case the contract is interpreted with even and equal justice to both sides; and the law does not allow one party only to avoid while the other is held bound. If both parties go on, that is another and their own affair. But either can claim that the contract is void, and then both are free. In my opinion, such an overruling and equally applicable case was brought about by the present European war, an event by reason of which the respondents are entitled to treat this shipbuilding contract as void. I agree that the appeal should be disallowed.

LORD WRENBURY. My Lords, article 5 of this contract provides that the steamer shall be completed for trial by a calendar date—which, as varied, is January 30, 1915—"unless" something happens which has happened. In the event, therefore, that calendar date is not fixed for completion. The article goes on to provide that in the event named "a fair proportionate extension of time shall be allowed." It is not provided in express terms that—but upon a true construction I think that it results that—in the event the completion is to be achieved by the expiration of that extended time.

The question then is as to the meaning of article 12. That article is not artistic. There is, in fact, no date *for delivery* fixed by the contract. The calendar date is a date for *completion;* delivery is to follow. But nothing really turns upon

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this difference. By calendar date I subsequently mean the date after the calendar date when, having regard to article 5, delivery is to be made.

The appellant says that "the date agreed by this contract" in article 12 is, in the event which has happened, not the calendar date but the expiration of the "fair proportionate extension of time." I am not of this opinion. If this were so, there would be eight months—or eighteen months, as the case may be—from the expiration of the "fair proportionate extension of time." Article 12 has, I think, explained article 5 by naming a period at the expiration of which both the fair proportionate extension of time and also a further allowance before the contract "shall become void" will have elapsed. For this purpose "the date agreed by this contract" is the calendar date from which the former commences to run—that is to say, the calendar date—namely, January 30, 1915. Upon this point in my judgment the decision under appeal is right.

The next question is as to the meaning of "shall become void" in article 12. Does this include "shall be voidable at the option of the builder"? In my opinion it does. The article begins by naming certain events, four in number: In case the builders shall (1.) become bankrupt or (2.) insolvent, or (3.) shall fail, or (4.) be unable to deliver. Of these the first three are events which may be said to be the fault of the builder; the fourth is not or may not be his fault at all. He may be unable from an unpreventable cause beyond his control. If the word "void" is to be read "voidable," it results in the fourth case that upon principles well settled the meaning is that the contract is to be voidable at the option of the builder; for an event is named in which, through no fault of his own, a contract expressed to be voidable has become impossible or commercially impossible. If the contract be voidable at the builder's option he has by defending this case elected to avoid it, and this appeal must fail. If, on the other hand, the word means "void" and not "voidable," it equally results that the appeal fails. Whether the word be read "void" or be read "voidable," therefore, the appeal fails, unless the appellant can maintain that it means voidable at the option of the build-

ing owner, but not at the option of the builder. He has argued that this is the effect. In my opinion this is not so. The rule is that in a contract "void" is to be read "voidable," if the result of reading it as "void" would be to enable a party to avail himself of his own wrong to defeat his contract. It may be stated either in the form that if one party is in default it is "void as against him," or that if one party is in default it is "voidable at the option of the other party." The two amount to the same thing. But the contract is not "void" in favour of or "voidable at the option of" the party in default. He cannot say that it is void, and has no option of avoiding it in his own wrong. Here the contract is, in my opinion, voidable at the option of either party provided always that he is not seeking to avoid it in his own wrong. The contingency of war lasting more than eighteen months is a contingency not within the control of either party. The contract is void as against each, or, if you like so to express it, is voidable at the option of either, if the contingency occurs.

I notice that the award found that the eighteen months expired on July 30, 1916. This is not strictly accurate. But nothing turns upon the fact that an allowance should have been made for time for trial trip.

The appeal must in my judgment be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 25, 1918.

Solicitors for the appellants: *William A. Crump & Son.*
Solicitors for the respondents: *Calder Woods & Pethick.*

[HOUSE OF LORDS.]

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BRADLEY AND OTHERS . . . . . APPELLANTS;

AND

H. NEWSOM, SONS AND COMPANY RESPONDENTS.

Ship—Abandonment at Sea—Ship and Cargo subsequently salved—Right of Shipowner to Freight.

The defendants' ship, while on a voyage from Archangel to Hull with a wood cargo, was attacked by an enemy submarine, and the master and crew were compelled to leave the ship. The enemy attempted, but failed, to sink the ship; and she was subsequently found in a water-logged condition by a British patrol boat, and brought, with her cargo, to the Scottish coast, and was there taken possession of by the receiver of wreck. On the receipt of a telegram from the master that the ship had been sunk by a submarine (which he believed to be the fact), the owners wrote to the ship's agents a letter for communication to the cargo owners, advising them of the loss of the ship. On hearing that the ship was afloat, the plaintiffs, who were endorsees of the bill of lading, intervened and intimated to the receiver of wreck that they elected to take possession of the cargo where the ship lay; but, by arrangement, the defendants delivered the cargo at Hull without prejudice to the rights of the parties. The plaintiffs claimed delivery to them of the cargo free of freight, on the ground that the defendants had abandoned the prosecution of the voyage.

Held, (1.) by Lord Finlay L.C., Viscount Haldane, Lord Parmoor, and Lord Wrenbury (Lord Sumner dissenting), that there had been no abandonment of the ship by the master without any intention of returning to her, and without hope of recovery, so as to entitle the cargo owners to treat the contract as at an end, and to claim possession of the cargo without paying the freight; (2.) by all their Lordships, that the letter of the owners conveyed no intimation of an intention no longer to be bound by the contract.

The Cito (1881) 7 P. D. 5 and *The Arno* (1895) 72 L. T. 621 distinguished.

Decision of the Court of Appeal [1918] 1 K. B. 271 reversed

APPEAL from a decision of the Court of Appeal (1) affirming a decision of Sankey J. The facts are fully stated in the report of the case before the Court of Appeal and in the judgment of the Lord Chancellor, and are summarized in the headnote.

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

(1) [1918] 1 K. B. 271.

Sankey J. held that the master and crew had abandoned the ship in such circumstances as to indicate an intention not to perform the contract of affreightment, and that the cargo owners, the respondents, were therefore entitled to receive the cargo free of freight.

In the Court of Appeal this judgment was affirmed by a majority (Pickford L.J. and Bankes L.J., Sargant J. dissenting). The majority did not differ from the conclusion of Sankey J., that the act of the master and crew in leaving the ship amounted to an abandonment; but they based their judgment on the letter of the shipowners, which they held was a clear intimation to the charterers of their inability to carry out their contract.

Sargant J. differed on both points. In his opinion there had been no abandonment of the contract by the shipowners or their agent.

1918. June 28, July 2, 4. *MacKinnon, K.C.* (with him *Lewis Noad*), for the appellants.

The master and crew, in quitting the ship and seeking safety ashore, acted under compulsion, and not with any intention of abandoning the ship, so as to entitle the cargo owners to take possession of the cargo without paying the freight. What happened was done by force majeure. The letter written by the managing owner, under the erroneous belief that the ship was lost, and communicated to the cargo owners, carries the matter no further. *The Kathleen* (1), *The Cito* (2), and *The Arno* (3), upon which the respondents rely, are distinguishable in their facts; but, if and so far as those cases support the proposition that if, by whatever means and under whatever circumstances, a ship is left by the master and crew, and is subsequently salved, the owner loses his right to freight, it is submitted that they were wrongly decided. The question depends on the general rules of the law of contract, as was recognized by Gainsford Bruce J. in stating the question

(1) (1874) L. R. 4 A. & E. 269. (2) 7 P. D. 5.
(3) 72 L. T. 621; 8 Asp. M. L. C. 5.

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to be determined in *The Arno* (1), and does not depend upon any principle peculiar to charter parties and contracts of affreightment such as was laid down by Brett L.J. in *The Cito*. (2) That question is whether there has been, on the part of the owner or his servants, any intimation of an intention not to be further bound by the contract, so as to entitle the cargo owners to treat the contract as at an end. It cannot be successfully contended that whenever a carrier is out of possession of the goods bailed to him for any substantial time the owner of the goods can claim to take possession of them without paying the carriage, although the carrier is ready and willing to complete his contract. Here the temporary interruption of performance is not so radical a failure to perform the contract of affreightment as to amount to a repudiation of the contract which the cargo owners were entitled to accept.

Leck, *K.C.*, and *R. A. Wright*, *K.C.*, for the respondents. Wherever the performance of a contract of affreightment is in fact abandoned or has ceased the cargo owner is entitled to treat the contract at an end. When a ship is derelict, as Sankey J. held this ship to be, that is abandonment of possession of both ship and cargo, and that involves abandonment of the voyage. This case is indistinguishable from *The Kathleen* (3), *The Cito* (2), and *The Arno* (1), which have been approved by the Supreme Court in the United States in *The Eliza Lines*. (4) The state of facts created by the violence of the enemy does not differ from the state of facts arising from the violence of the sea. It is not suggested that the master acted improperly, but in quitting the ship he exercised an act of volition just as much as in the case of stress of weather. The abandonment of the ship involves an act by the master which goes to the root of the contract. The principle of *The Cito* (2) is that the cessation of performance of a continuous contract is an abandonment of the contract. Here is a derelict ship—i.e., a ship which the crew have left for good—and, the ship being derelict, the cargo owners were entitled to come

(1) 72 L. T. 621; 8 Asp. M. L. C. 5.
(2) 7 P. D. 5.
(3) L. R. 4 A. & E. 269.
(4) (1905) 199 U.S. 119.

and claim their property, as they did, before the shipowner came on the scene. Suppose there had been no interference by the cargo owners at the port where the ship lay and the goods had been delivered at the port of destination; it might be held that there had been a waiver of the failure to perform—a point which Lord Esher leaves open in *The Arno* (1)—but the abandonment was itself a failure to perform the contract, although it might be followed by circumstances which annulled the effect of the abandonment. The cargo owners are willing to assume that but for their intervention the shipowners would have been entitled to freight. But whereas here there has been an abandonment in fact, whether with or without volition is immaterial, and during that abandonment a re-entry by the cargo owners, the latter have a right to take their goods, and no claim for freight arises.

MacKinnon, K.C., replied.

[The following cases were also referred to: *Guthrie* v. *North China Insurance Co.* (2); *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (3); *Johnstone* v. *Milling* (4); *Hochster* v. *De la Tour* (5); *Thornely* v. *Hebson* (6); *Cossman* v. *West* (7); *Bentsen* v. *Taylor, Sons & Co.* (8)]

The House took time for consideration.

July 29. LORD FINLAY L.C. My Lords, this case relates to a contract for the carriage of a cargo of timber from Archangel to Hull on the ss. *Jupiter*, and the question is whether the cargo owners, the plaintiffs in the action and now respondents, were entitled without payment of freight to demand delivery of the timber at Leith, to which place the vessel had been brought by salvors. The claim rested on the contention that the vessel was "derelict" when she was picked up by salvors, and that this amounted to an abandonment by the appellants

(1) 72 L. T. 621; 8 Asp. M. L. C. 5.
(2) (1902) 7 Com. Cas. 130.
(3) (1882) 9 Q. B. D. 648, 657; (1884) 9 App. Cas. 434.
(4) (1886) 16 Q. B. D. 460, 472.
(5) (1853) 2 E. & B. 678.
(6) (1819) 2 B. & Al. 513.
(7) (1887) 13 App. Cas. 160, 177.
(8) [1893] 2 Q. B. 274.

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of the contract of carriage which entitled the cargo owners to take possession of the goods at Leith.

The cargo owners brought the action by writ dated October 25, 1916, claiming a declaration that they were entitled to delivery. The points of claim alleged that the *Jupiter* while proceeding on the voyage was attacked on October 7 by enemy submarines, and that the master and crew abandoned the vessel, which was picked up by vessels of H.M. Patrol Flotilla and brought into Leith, where she was beached and placed in the hands of the receiver of wreck. In the points of defence the defendants denied the abandonment, and pleaded that the crew was compelled to leave the vessel by an enemy submarine, and the defendants counter-claimed for the freight.

The respondents had chartered the *Jupiter*, which belongs to the appellants, by the charterparty of July 18, 1916, for the carriage from Archangel to Hull of a cargo of deals, battens and other timber at agreed rates. By the 7th Clause the act of God, the King's enemies, restraints of princes and rulers, the perils of the seas, were excepted. Bills of lading were given and these are held by the respondents.

What happened is best stated in the words of the protest by the master of the *Jupiter* and others, dated October 11, 1916: "That after discharging the pilot and tug the vessel proceeded without the occurrence of anything worthy of note until 3.40 p.m. on the 7th day of October instant, when appearer's vessel was crossing the Firth of Forth with the Longstone Lighthouse bearing S. by W. about 40 miles distant. Whilst following the route laid down by the Admiralty, appearer the master suddenly saw a submarine rise out of the water on his vessel's starboard side, and about a quarter of a mile distant. The submarine at once fired a blank shot over appearer's vessel, followed immediately afterwards by two more live shots forward and aft of the appearer's vessel. The submarine then signalled to appearers to abandon their ship. Seeing no possible chance of escape, appearer the master at once ordered the crew to take to the boats, and the submarine signalled for these to go on her. On getting near the commander of the

submarine asked appearer the master for the ship's papers, but was told they were still on board the vessel. The commander also demanded from the master the name of the vessel, to where she belonged, her registered tonnage and what their position then was, which information was given by the master. Appearer's second boat, which contained the mate and second engineer, was then ordered alongside the submarine, and the engineer was taken on board. Four of the Germans then proceeded to appearer's vessel in the mate's boat, taking the mate with them, and remained aboard about ten minutes, where they took possession of the ship's papers, forcing the mate to show them these with threats of loaded revolvers, and they then returned to the submarine. Shortly afterwards appearer the master heard an explosion aboard his vessel, which had previously had a strong list to port, and which after the explosion took a strong list to starboard. The submarine subsequently took appearer's two boats in tow and towed them in a westerly direction for about five miles, when they were cast adrift, and during this towage appearers heard further explosions aboard their vessel, of which they lost sight in the gathering darkness. At 7.30 p.m. appearers were picked up by the trawler *Ayacanora* of North Shields (No. 72), which vessel took appearers to Aberdeen, where they arrived at 10.30 a.m. on Sunday morning, the 8th October, and where appearer the master at once reported the matter to the naval authorities. And appearer the master saith that as soon as he sighted the submarine he destroyed his secret instructions by tearing them up and throwing the pieces overboard. And appearers lastly say that they have subsequently heard that the vessel, floating on her cargo, has been picked up and beached near Newhaven."

The master was under the impression that the steamship had sunk, and on his arrival at Aberdeen on the morning of October 8 telegraphed to Mr. Bradley, "Ship sunk yesterday submarine," and repeated this in his letter of that day to Mr. Bradley. By Mr. Bradley's instructions his agents, Messrs. Bordewich, sent on October 9 the following letter to the respondents :—

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"9th October, 1916.

"Messrs. H. Newsom, Sons & Co., Limited,
"Hull.

"Dear Sirs,
ss. *Jupiter*.

"We have the following letter from owner of this steamer to-day, which kindly note :—

"'It is with very great regret I advise you of the loss of my ss. *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew have all been landed safely. Will you kindly advise charterers and oblige ?'

"Yours faithfully,
"(Signed) P. R. Bordewich & Co."

At 2 a.m. on Wednesday, October 11, the *Jupiter*, which had been picked up by a Government patrol boat, was beached at Newhaven, a village within the limits of the port of Leith. The appellants were informed of this by a telephonic message from their agents at Leith, Messrs. Furness, Withy & Co., which they received at 10.35 a.m. on the morning of the same day (October 11). Mr. Bradley requested Messrs. Furness to protect his interests at Leith, and informed them that he would arrive that night. He left Hull by train at 5.5 p.m., and arrived at Leith after 11 p.m. Before he left Hull he had received from the respondents' solicitors the following telegram :

"Hull, 11th October, 1916.

"London O.
"Handed in at 2.27 p.m.
"Received here at 2.47 p.m.
"To Fuel Hull.

"*Jupiter* we represent owners cargo of this steamer recently brought into Leith derelict our clients elect take possession their property where now lying please note.

"Legal."

The respondents' solicitors also sent to the receiver of wreck at Leith the following telegram :—

"11th October, 1916.

"Receiver of Wreck, Leith.

"Sent 2.27.

"Received 3.20.

"Steamer *Jupiter* we represent owners cargo understand she is now lying at Newhaven please note our clients claim elect take possession their property where steamer now is please do not allow cargo to be dealt with except with our sanction please do anything necessary protect property for our clients. "Legal."

The shipowners asserted that they were entitled to take the cargo on to Hull, thus earning their freight, which would amount to more than 14,000*l.*, while the cargo owners insisted on their right to take possession at Leith without payment of any freight as the voyage had not been completed. On October 26, the day after the writ in the action was issued, an agreement was entered into by a memorandum of that date arranging for the carriage to Hull of the cargo, reserving the question of liability for payment of freight to be decided in the action. The cargo was accordingly carried to Hull, and delivered there.

The question now is whether freight was payable. Sankey J. held that the case came within the authority of *The Cito* (1) and *The Arno*. (2) He said that the abandonment of a vessel by its crew during a voyage without any intention to retake possession gives the owner of the cargo the right to treat the contract of affreightment as at an end, and that the cargo owners had exercised this right before the shipowners resumed possession. He summed up his view of the case thus: "In my view there was in fact an abandonment of the vessel, and there was, on the part of the servants of the owners, an act done clearly indicating their intention not to carry out the contract; in other words, there was the predicament mentioned by A. L. Smith L.J. in *The Arno* (3) of a ship left derelict in mid-ocean and abandoned by its master and crew." (4) His Lordship, therefore, gave judgment for the

(1) 7 P. D. 5.
(2) 72 L. T. 621.
(3) 72 L. T. 624.
(4) [1917] 2 K. B. 112, 116.

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plaintiffs for the relief claimed. In view of a possible appeal, he found that the amount of freight, if payable, would be 14,050*l.* 2*s.* 9*d.*

The shipowners appealed. The Court of Appeal were divided in opinion. The majority, Pickford L.J. and Bankes L.J., affirmed the judgment of Sankey J., but on a different ground. They held that the letter of October 9, 1916, from the shipowners' agent to the cargo owners, advising them of the loss of the ss. *Jupiter*, amounted to an intimation that the shipowners were not in a position to carry out the contract, and justified the cargo owners in treating the contract of affreightment as at an end, and in claiming the delivery of the cargo at Leith without payment of any freight. Sargant J. differed. He held that the crew did not "abandon" the ship by quitting it under the compulsion of the enemy submarine, and that the communication of the supposed fact of the loss of the vessel did not amount to an intimation of the shipowners' intention not to carry out the contract. In accordance with the opinion of the majority the appeal was dismissed with costs. From this decision the shipowners appeal to your Lordships' House.

The effect of Sir Robert Phillimore's decisions in *The Kathleen* (1) and of the Court of Appeal's in *The Cito* (2) and *The Arno* (3) is that if a ship be abandoned by her master and crew during a voyage, the cargo owner may elect to treat the contract of affreightment as at an end, and claim delivery of his goods without payment of any freight. I agree with the principle of law laid down in these cases. This principle would apply to the present case if quitting the vessel under the circumstances amounted to an abandonment within the meaning of the rule as laid down in these cases. For this purpose there must be an abandonment without any intention to retake possession, and it must be the act of the master and crew. The test is sometimes said to be whether the vessel has become a derelict. This is merely another way of stating the same question. The word "derelict" is sometimes loosely used as denoting a vessel drifting about at sea without any crew on

(1) L. R. 4 A. & E. 269. (2) 7 P. D. 5. (3) 72 L. T. 624.

board, but the legal sense of the term is that this state of things must have been brought about by the abandonment of the vessel by the master and crew. A vessel would not be a derelict if the master and all the crew had been swept off the deck by a heavy sea and drowned, or if all on board were dead of the plague. Sir W. Scott laid it down in *The Aquila* (1) that it is sufficient to constitute a derelict if there has been abandonment at sea by the master and crew without hope of recovery. There must be no spes recuperandi and no animus revertendi. (See *The Zeta*. (2)) And this, as was said by Dr. Lushington in *The Sarah Bell* (3), depends on the state of mind of the master and crew at the time when they quitted the vessel. If this be once ascertained a subsequent change of intention on their part and effort to save the vessel are immaterial. The animus derelinquendi is essential to constitute a derelict: *The John and Jane*. (4) As was said by Sir Barnes Peacock in delivering the judgment of the Judicial Committee in *Cossman* v. *West* (5), the term "derelict" is legally applicable to a ship which is abandoned and deserted at sea by the master and crew without any intention of returning to her.

In *The Fenix* (6) the crew of one of two vessels in collision jumped on to the other, and Dr. Lushington pointed out that the salvors were not entitled to such a proportion as is usually given in cases of derelicts, "because the vessel was not abandoned in consequence of being utterly incapable of being navigated or because she was not seaworthy; it was merely from a sense of imminent danger, not knowing what the consequences of the collision might be. It was an abandonment for the security of the person, accompanied with an intention of returning, provided that life should no longer be in danger. I cannot, therefore," he said, "consider this case to be placed in the category of ordinary cases of derelict." The whole of this subject was considered in the High Court of Admiralty in Ireland in *The Cosmopolitan*. (7) The circumstances of that case were

(1) (1798) 1 C. Rob. 37, 41.
(2) (1875) L. R. 4 A. & E. 460, 462.
(3) (1845) 4 Notes of Cases 144, 146.
(4) (1802) 4 C. Rob. 216.
(5) 13 App. Cas. 160, 180.
(6) (1855) Swab. 13, 15.
(7) (1848) 6 Notes of Cases, Supplement xvii.

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similar to those of *The Fenix* (1), and the learned judge, Dr. Stock, made an elaborate review of the authorities, and said: "The issue is quo animo the act of quitting was done." (2) On the question of derelict or not derelict everything depends on the state of mind of the master and crew when they quit the vessel, and their state of mind may, of course, be inferred from the surrounding circumstances.

Dr. Lushington remarked in *The Florence* (3) that the abandonment for the purpose of constituting a case of derelict must be by order of the master, in consequence of danger by reason of damage to the ship and the state of the elements, and went on to say: "The master is, as I conceive, the proper person to form a judgment whether abandonment be absolutely necessary or not. He is the person whom the owners have voluntarily intrusted with the command of their vessel, and the care of the property embarked in it; they must be taken to have deemed him competent to the discharge of the duties committed to him, and especially that he would not, without adequate cause, leave to destruction their property." The question is not of the intention of the owner personally. In the immense majority of cases he does not, and cannot, know anything of the abandonment until after it has been effected; but he acts in this matter through the master as his agent. The effect upon the contract of affreightment of the final abandonment of a vessel at sea is only an example of the general law of contract, by which if one contracting party puts it out of his power to carry out the contract the other may treat the contract as at an end.

The question of what constitutes a derelict has very commonly arisen when the scale of salvage was under consideration, as more liberal remuneration was usually given if the vessel was a derelict; but it has also arisen when the point was whether the crew of the vessel were entitled to salvage remuneration in afterwards saving her, on the ground that their contract of service was brought to an end when the vessel became derelict. See *The Florence*. (3)

(1) (1855) Swab. 13, 15. (2) At p. xxvi.
(3) (1852) 16 Jur. (O.S.) 572, 573.

The fact that the vessel is a derelict does not involve necessarily the loss of the owner's property in it, but any salvors by whom such a vessel is picked up have the right to possession and control. In *The Dantzic Packet* (1) Sir John Nicholl, in dealing with the misconduct of salvors who had attempted to exclude other salvors, said: "It is different in the case of a derelict; there the first occupant has a vested interest, and a right of exclusive possession, if alone he can save the property; he takes possession indeed for the benefit of the Crown, in the first instance,—but subject to a liberal remuneration." In the marginal note to this passage there are inserted after the words "of the Crown" the words "or owners." The question of property in a derelict was discussed in *The Cito*, and Brett L.J. (2) says that he was not prepared to accept the proposition that abandonment constituting a derelict, together with a subsequent seizure by anyone who found it, would make the ship a droit of Admiralty, and alter the property. It was stated by the King's Advocate in the case of *The King* v. *Property Derelict* (3) that the owner would be entitled if he came in in time, otherwise the Crown; but this topic is, of course, immaterial for the purposes of the present case.

The crucial question is this. Was this vessel, when she was picked up by salvors, a derelict in the legal sense of the term; or, in other words, had the master and crew *abandoned* her without any intention of returning to her, and without hope of recovery? It appears to me to be quite impossible to answer this question in the affirmative. In quitting the vessel the master and crew simply yielded to force. There was no voluntary act on their part, and the case stands exactly as it would have done if they had been carried off the vessel by physical violence on the part of the crew of the German submarine. It would be extravagant to impute to them the intention of leaving the ship finally and for good. They simply bowed to the pressure of irresistible physical force. If a British destroyer had appeared on the scene, and had

(1) (1837) 3 Hagg. Adm. 383, 385. (2) 7 P. D. 8.
(3) (1825) 1 Hagg. Adm. 383, 384.

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driven off or sunk the submarine, they would gladly have returned to their vessel. All they intended was to save their lives by obeying the orders of the German captain. I entirely agree with Sargant J.'s observations on this part of the case. The physical act of leaving the vessel is only one feature in such a case. Another and essential feature, in order to make it a case of derelict, is the state of mind of the captain and crew when they left. The question quo animo is decisive, and the facts seem to me to show clearly that the quitting of the ship was not under such circumstances as to make it a case of derelict. The *Kathleen* (1), *Cito* (2) and *Arno* (3) appear to me to have no application. The case is merely one of temporary interruption of the voyage by the action of an enemy submarine, and this afforded no ground for the claim of the cargo owners to resume possession of the goods at Leith when the greater part of the voyage had been completed. The shipowners were ready and willing to carry the goods on to Hull, and were entitled to do so.

The contention that the communication to the cargo owners of the erroneous information of the loss of the ship amounted to abandonment of the contract of carriage is not sustainable. It was a very proper thing to convey this information to the cargo owners in order that they might take any action which the fact, if it really had occurred, would render expedient in their interests. I cannot see how it can possibly be considered as an intimation that the shipowners abandoned the contract of carriage whether the information was true or not.

For these reasons I think that the appeal should be allowed, and judgment entered for the appellants, with costs here and below.

VISCOUNT HALDANE. My Lords, this is an appeal from a judgment of the Court of Appeal (Pickford and Banks L.JJ., Sargant J. dissenting), which affirmed a judgment of Sankey J. The question raised was whether the respondents, the

(1) L. R. 4 A. & E. 269. (2) 7 P. D. 5.
(3) 72 L. T. 621.

charterers of the s.s. *Jupiter*, were entitled to claim delivery of the cargo (which consisted of timber) at Leith, not being the port of destination, free of freight. The voyage contracted for with the appellants, the owners of the steamer, was to be from Archangel to Hull, where the cargo should have been delivered, and the matter in dispute was as to whether the appellants, through their master, had abandoned possession in the open sea of the steamer and cargo in such a way that the respondents were entitled to resume possession of their cargo at Leith where they found it, free of the freight, which would have amounted to 14,050*l.* 2*s.*

My Lords, the charterparty was dated July 18, 1916. It contained an exceptions clause, which included in its terms the acts of the King's enemies, restraints of princes, perils of the seas, and other matters—even when occasioned by the negligence or error of the master. The cargo of timber was loaded at Archangel, under several bills of lading, all in the same form and with the same exceptions as in the charterparty. The steamer started from Archangel on September 25, 1916, on the voyage. All went well until Saturday, October 7, when she was crossing the Firth of Forth on her way to Hull. As she was crossing the Firth a German submarine attacked her. The submarine fired on the *Jupiter*, and signalled to her crew to quit her. The master, seeing no chance of escape, ordered the crew into the boats. The submarine then signalled for the boats to come to her, and finally the mate's boat was ordered to lie alongside the submarine. Four armed Germans got into her and went back, taking the mate with them, to the *Jupiter*, and there, by threatening him with loaded revolvers, compelled the mate to find, and hand them, the ship's papers. The Germans then went below, and placed bombs in her and opened the sea connections. Then they returned to the submarine. A little later an explosion on board the *Jupiter* was heard, and she was seen to take a list to starboard. The submarine then took the steamer's boats in tow, and towed them towards the coast of Scotland for about five miles. During this towage further explosions were heard by the

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master to take place on board the *Jupiter*, but it became so dark that he could not see her any more. The submarine, after towing the boats for five miles, finally cast them off, and the master and crew were later on picked up by a trawler and taken to Aberdeen, where they arrived at 10.30 on Sunday morning, October 8, and at once reported what had happened to the naval authorities. The master was under the impression that the *Jupiter* had been sunk, and telegraphed to the owners to that effect about noon on the Sunday. In the evening he heard that the *Jupiter* was afloat and in tow, but he appears to have been doubtful whether she could actually be saved.

On receipt of the telegram from the master the appellants instructed their brokers to inform the respondents of their news, and the brokers on Monday, October 9, sent to the respondents a copy of a letter which they had that day received from the appellants: "It is with very great regret that I advise you of the loss of my s.s. *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew have all been safely landed. Will you kindly advise charterers, and oblige?"

My Lords, in fact the *Jupiter* had not been sunk. Her cargo was a buoyant one, and she remained afloat. Salvors got hold of her, and she was brought into Newhaven, close to Leith, on the night of the Tuesday or in the early morning of the Wednesday. On the Wednesday, at 10.35 a.m., Mr. Bradley, who is one of the appellant owners, was informed by telephone by his agents at Leith that the *Jupiter* was afloat, and had been brought in, and he asked them to protect his interests, and said that he would come to Leith that evening. This he did. Just before starting, at 5 p.m., he received a telegram from the respondents' solicitors in these terms: "*Jupiter*, we represent cargo of this steamer, recently brought into Leith derelict. Our clients elect take possession their property where now lying." The respondents' solicitors also telegraphed in similar terms to the receiver of wreck at Leith, requesting him further to do what was necessary to protect their clients' property.

It will be observed that the telegram from the respondents' solicitors to the appellant Bradley is based on the assertion that the steamer had been derelict. The real question is whether she was so. For the appellant Bradley went to Leith at once; and finally, on the footing that it was to be without prejudice to any of his rights, got hold of the steamer and navigated her to Hull, where the cargo of timber was landed.

My Lords, what we have to consider is whether the steamer was really abandoned so as to become derelict and no longer possessed or owned by the appellants. If this was so, the contract was abandoned with the vessel, and the cargo owners were entitled to take possession of the cargo if they could, and free of freight. If the steamer had sunk, and the cargo had somehow floated independently of her, the result would have been the same. The physical fact of the actual loss of the steamer which was to have made the voyage would have imported the loss of all title to claim on the footing that the contract had been carried out. But the steamer was, in fact, not lost; and the question, therefore, is whether she was abandoned so that the same result followed from her having ceased to be, in point of law, any longer the possession or the property of the appellants. It will be convenient to consider this question, in the first place, as one of principle, before referring to authorities. I think that the letter of October 9, 1916, sent by the appellants' brokers to the respondents, did not convey any intimation of intention on the part of the appellants to abandon their steamer if it had not been sunk. The intimation was merely one of their belief that she was sunk, and this belief was founded on what proved, in the result, to have been a mistake of fact. There was nothing in the letter which warranted the statement made by the respondents through their solicitors in their telegram of the 11th, when they had ascertained the truth, that the steamer, not having been sunk, but having been brought into Leith, the owners had abandoned her. If this be so, it follows that the foundation of the reasoning of Sankey J. in his judgment is unsound. He held that there was an abandonment, and that there was, therefore, a repudiation of the

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contract. But I am unable to find, in the circumstances, any evidence disclosing the element of intention which seems essential to the application of the doctrine of abandonment in cases where there has been no actual loss. The master and crew really left the steamer not of their own volition but under duress, being forced to do so. As the result, they cannot be taken to have chosen to repudiate their obligation to carry any more than they can be taken to have chosen to abandon the vessel. The fact of having been forced away from her is one thing. An intention to leave her derelict is quite a different thing. They did not leave the vessel. It was really taken from them. I think there is a confusion in the judgments of the Courts below between a being parted from the vessel by force of arms and a quitting of it as an act of freewill. No doubt if they had quitted it because they desired to make sure of saving themselves from being drowned if she went down, that would have been an act to the performance of which they would have been moved by a motive, none the less that it was one of the most potent. It would have been an act of volition, just as on the other hand it is plainly an act of volition when men elect to perish with a war vessel instead of being taken prisoners and saved. But in this case I am of opinion that there was no act on the part of the master and crew which the law can treat as one of free choice. They were not bound to choose to resist in vain, and they did not do so.

Once reached, this conclusion appears to me to be fatal to the similar reasoning which prevails with the majority in the Court of Appeal. I agree with Sargant J. in thinking that the vessel was neither lost in fact nor was the subject of any intention indicated to abandon her if she should not prove to be lost. There was no such intention indicated either by the owners or by the master and crew. All of them were for a time under the mistaken belief of facts that the vessel had been lost, but there was no more than this belief with the bare implications dependent on it.

Apart from the possible result of authority, I should have thought that these considerations were fatal to the

conclusions reached by Pickford and Bankes L.JJ. But those learned judges were of opinion that they were bound to hold as they did because of the decided cases, and particularly by the decisions in *The Cito* (1) and *The Arno*. (2) Now, when I look at these cases, I find in them mere exemplifications of a wider principle which seems to me not to apply here—the general principle laid down by Lord Campbell C.J. in *Hochster* v. *De la Tour*. (3) There the defendant had bound himself to employ the plaintiff as courier from a date subsequent to that of the writ. The breach alleged was that, before the day for the commencement of the employment, the defendant had intimated a refusal to carry out the agreement. The jury found for the plaintiff, and there was a motion in arrest of judgment or for a non-suit. The defendant contended that there could be no breach until the day for performance, which had not arrived when the action was commenced, and that both parties remained bound. But the Court of Queen's Bench held that, both on principle and on authority, the parties were, from the time of making the agreement, engaged each with the other, and that it was a breach of an implied contract if either of them renounced the engagement. Otherwise, if the plaintiff had no remedy unless he continued to treat this contract as in force, he could not enter into any other employment which would prevent him from being bound to performance when the due date should arrive, and this would merely tend to increase the damages. He ought, therefore, to be held as at liberty to rely on the defendant's assertion of intention to treat their obligation as altogether at an end, and the defendant should not be permitted to take this assertion back. The repudiation in advance, therefore, entitled the plaintiff to say that there had been a breach of contract. The principle laid down in this judgment has often been followed, and is undoubtedly right. My Lords, I think it explains and is the foundation of the decisions on abandonment of contracts to carry at sea when there has been no actual loss of the vessel.

(1) 7 P. D. 5. (2) 72 L. T. 621.
(3) (1853) 2 E. & B. 678.

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In the case of *The Kathleen* (1), a barque, laden with cargo shipped in America for Bremen as the port of destination, was run into in the Channel, and in consequence abandoned. It was held that the abandonment put an end to the contract to pay freight, notwithstanding that the barque and cargo were ultimately salved, and properly sold by order of the Court, reserving questions of freight. Sir Robert Phillimore, in giving judgment, said that even if a new implied contract in the course of the salvage operations might have given the shipowner a title to pro rata freight, no such claim could be established in the face of what had happened. By abandoning the ship was rendered derelict and put into the possession of the salvors, and it was clear that the original contract no longer subsisted, and that the title to the possession of the cargo became as from the time of the abandonment one in the cargo owners, so far as they could assert at all, arising only through the salvors and the Salvage Court, and not through the shipowners.

In *The Cito* (2) the Court of Appeal gave a similar decision. Brett L.J. explained the law as being that " by an abandonment of a ship without any intention to retake possession of it, the shipowner has, so far as he can, abandoned the contract, so as to allow the other party to it, the cargo owner, to treat it as abandoned." Cotton L.J. added that it was true "that the shipowners could not by their own act put an end to the contract of affreightment, but by their abandonment they gave a right to the cargo owners to elect to treat the contract at an end, and the shipowners could not . . . . after their abandonment have objected, if the cargo owners had found another vessel and taken the cargo on in it to the port of destination." Lindley L.J. concurred.

My Lords, *The Arno* (3) was also a decision of the Court of Appeal. The vessel had been justifiably abandoned, owing to perils of the sea, on March 31, 1895. She drifted with her cargo until April 3, when salvors found her, and brought both ship and cargo to Liverpool, the port of

(1) L. R. 4 A. & E. 269. (2) 7 P. D. 5, 8, 9.
(3) 72 L. T. 621.

destination and discharge, where they arrived on April 25. On April 11 the owner, having heard of the towage of the ship by salvors, but not knowing to what port in England they might bring her, got the salvors to agree on that date to hold for him subject to their claim for salvage. On April 18 the cargo owners claimed to be entitled to the possession of their cargo free of freight. It was held that the salvors were not the agents of the shipowner, so as to make their possession of the cargo his. He did not get possession of it until arrival at Liverpool, and then, before he could claim, had to pay salvage on the cargo. Thus a new burden had been put on the cargo owner inconsistent with the original contract of affreightment, and he was entitled to elect, as he had done while this state of things existed, to treat the contract as repudiated. The judgments, in my opinion, merely exemplify the principle of *Hochster* v. *De la Tour*. (1)

My Lords, in the case before us, if the vessel had been in point of fact lost, that would have put an end to the very basis of the contract of carriage, and not the less would this have been so if, the ship having been lost, the cargo had floated and the cargo owner had rescued it. But these things did not happen here. Nor did the owners, through the master and crew or otherwise, express or imply an intention to abandon. All that really occurred was that, in the erroneous belief that the former alternative, an actual loss of the *Jupiter*, had taken place, the owners of the steamer informed the cargo owners of what they believed to have happened. They were wrong in this; but their mistaken statement of the facts disclosed no intention that I can discover to repudiate if the facts were otherwise and the vessel was actually still in existence.

I agree with the view of Sargant J., who dissented from the majority in the Court of Appeal, and I think that we ought to reverse the judgment.

LORD SUMNER (read by Lord Wrenbury). My Lords, two questions have been raised in this case: the first, as

(1) 2 E. & B. 678.

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to the effect of the communications between the parties on shore; the second, as to the nature and effect of the events which took place at sea. I think that the shipowners' letter, passed on to the cargo owners at Hull, did not intimate an intention no longer to be bound by the contract of carriage. It stated a fact, and it stated it wrong. The cargo owners could not have taken it as a statement of such an intention, for they must have seen that, if the shipowners had known what they knew, their intention would have been the very opposite. The episode seems to me irrelevant. There is nothing on the record to show that the solicitors, who first put forward the claim to take the cargo at Leith, knew anything about this letter when they did so. Their clients may have been underwriters. They may have acted on news of the ship not obtained from the cargo owners at all. They have never laid stress on this letter as the foundation of substantive rights, and the prominence given to it in the Court of Appeal was excessive.

The real point of the case is the fact that the *Jupiter* was left for good at sea to fare as she might, and that the master and crew came ashore. The word "abandonment," though unavoidable, is apt to be ambiguous. It introduces special considerations of marine insurance law not now in question. As little is it a question of abandoning a contract. The effect upon the contract is a conclusion of law. The fact was that all the shipowners' servants abandoned ship and cargo on the high seas, to sink or swim, and believed they had sunk, although the ship just floated on her cargo till she was salved next day.

It is common enough for a laden ship to be left derelict at sea, and many decisions have settled the legal consequences. Several sets of rights are affected. A salvor's possessory right is different where the ship is derelict and where it is not. The crew of a derelict may claim that their contract of employment has terminated, and may be awarded remuneration as salvors for services rendered. The rights of assured and underwriters may be in question, or, as here, the right of a cargo owner to claim that the performance of the contract

of carriage has come to an end and cannot be renewed. It is highly desirable, since so many interests may be affected by it, that existing views about what makes a derelict should not be unsettled, and that the test of a ship's being derelict should be such as can be readily applied and will not be dependent on inquiry into the state of mind of men, who, unfortunately, may not have survived the marine disaster. As to the rights of the cargo owners the authorities, extending over about forty years, are all one way. *The Kathleen* (1), *The Cito* (2), and *The Arno* (3) are all decisions on motions in salvage actions for delivery of cargo to the cargo owners freight free. They have often been applied in cases not formally reported, and have been followed in the Supreme Court of the United States: *The Eliza Lines.* (4) The proposition there laid down was that by the general principle of contract an open cessation of performance with the intent to do no more, even if justified, excuses the other party from further performance on his side. No contrary decision has been found. Judge Carver states their effect thus: (5) "Where a ship has been definitely abandoned at sea by the master and crew, without any intention of coming back to her, ... the freighter is entitled to treat the contract of carriage as abandoned. So that if the ship, or the cargo, be afterwards brought into port by salvors, the cargo owners may claim to have their goods without paying any freight; even though the shipowner is ready and demands to be allowed to take them on to their destination," and the learned authors of Scrutton on Charter Parties (I quote from the edition of 1914, p. 318) say: "Where the shipowner has no longer a right to carry on, as where he abandons the ship and cargo, or where he delays repair or transhipment beyond a reasonable time, the goods owner, who receives his goods, will not thereby give the shipowner any claim for freight pro rata." Obviously, it is à fortiori to say that there will be no claim for ordinary bill of lading freight. Lord Justice Kennedy's work on Civil Salvage is to the like effect.

(1) L. R. 4 A. & E. 269.
(2) 7 P. D. 5.
(3) 72 L. T. 621.
(4) 199 U.S. 119.
(5) § 555.

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My Lords, I think that the argument disclosed a misapprehension of the principle on which these decisions rest, for the suggestion was that, except that it is done by an agent, a master's act in leaving ship and cargo derelict at sea is identical in principle with an intimation made by one of the parties to an executory contract to the other, that he does not intend to perform his part of the contract or to be bound by his obligations under it when the time for performance or observance may arrive. Hence it was argued that in such a case (1.) the actual intention of the captain as a mental state is crucial; (2.) that the actual intention of the shipowner is also material, since his mind is deemed to have gone to the making of the contract, and must therefore play its part in the unmaking of it, and that any breach by leaving the ship derelict cannot be final so long as it is possible that he may repair the consequences of the master's conduct; and (3.) that the act of quitting the ship cannot have effect on the rights of the other contracting party until it has been intimated to him by the shipowner, or on his behalf. I think this argument was fallacious.

As the judgments in *The Cito* (1) and *The Arno* (2) show, there is an analogy between those cases and *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (3), but the distinctions between them must be kept in mind. The master is the shipowner's agent to perform the voyage and to take such decisions and do such acts in the course of it as must be taken then and there by the person in command; but his employment does not of itself ordinarily authorize him to vary a contract made by his employer. His actions may have far-reaching consequences, but he is not authorized to form, or express, his employer's intentions, as such, in a matter of his employer's contract. If, however, the shipowner, by his authorized agent, has definitely ended the performance of the voyage in medio, and quitted possession of the cargo, which is the effect of leaving the ship derelict, the cargo owner is free to do what he will with his own. Thus only the result, and not the question, is

(1) 7 P. D. 5. (2) 72 L. T. 621.
(3) 9 App. Cas. 434.

the same as in the *Mersey Steel Co.'s Case* (1), which turns, not on the significance of an act, but on the intimation of an intention, not on performance entirely brought to a premature end, but on an anticipatory refusal further to perform at all.

If this is right the master's frame of mind is not the question; his acts are. If the master and crew perished the result would be the same. Whether he was moved to quit the vessel by one kind of peril or another cannot matter when he does quit it for good, and not for the purpose of procuring the means of prosecuting the voyage in the course of a temporary absence. In some ways, indeed, the matter is most conclusive when least is known of the captain's actual mental processes. The shipowner's intention is not material nor is even his knowledge, for if the voyage is at an end and the cargo owner has availed himself of his liberty, the shipowner cannot revive it by acquiring knowledge and thereupon forming an intention. Equally little can intimation to the cargo owner matter; for if the master's action has in truth put an end to the voyage and the cargo owner knows it, he is free to avail himself of his legal right without more.

The effect on the contract of carriage of maritime disaster occurring in the course of a voyage was originally always discussed in connection with claims for freight pro rata itineris peracti. It was not until the middle of the last century that the shipowner's right to tranship at a port of refuge and earn original bill of lading freight by carrying on in another bottom was fully recognized in this country; and it has never been formally decided that he has the same right when the ship is abandoned at sea and possession of the cargo has been abandoned with it instead of being retained at the port of refuge as in earlier cases. Yet the language used in the earlier cases is significant, though the circumstances of the two types of cases differ so widely. In *Hunter* v. *Prinsep* (2), where the cargo had been sold at the master's instance by order of a Court in a port of distress, Lord Ellenborough says: "If no freight be earned, and he decline proceeding to earn any, the freighter has a right

(1) 9 App. Cas. 434. (2) (1808) 10 East, 378, 394.

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to the possession. The captain's conduct in obtaining an order for selling the goods, and selling them accordingly, which was unnecessary, and which disabled him from forwarding the goods, was in effect declining to proceed to earn any freight." I ask myself why the captain's conduct in leaving the goods to their fate at sea is not also in effect a " declining to proceed to earn freight," which gives the freighter a similar right to possession. If stress be laid on the words " which was unnecessary," I recall that the salvors were held to have got possession in *Cossman* v. *West*, though the abandonment was only necessary because the captain had first scuttled the ship. Again, in *Shipton* v. *Thornton* (1), which established the right to tranship in order to complete the earning of the bill of lading freight, Lord Denman says : " In the case supposed " (that is, the case of a ship disabled in a port of refuge without fault of the master) " . . . . let the owner of the goods arrive, and insist, as he undoubtedly may, that the goods shall not proceed, but be delivered to him at the intermediate port : there is then no question that the whole freight at the original rate must be paid ; and that because the freighter prevents the master, who is able and willing, and has the right to insist on it, from fulfilling the contract on his part, and because the sending the goods to their destination in another vessel is deemed a fulfilment of the contract." Whatever other criticisms may arise on this language I think it is clear that this passage, which states the principles on which the right to tranship or carry on was upheld, rests on the proposition that the master is able and willing to fulfil the contract, which though a contract for carriage in a named ship is deemed to be validly performable in another, where carriage in the original ship to the destination is both impossible and excusable. This prevents it from being a mere claim to take the benefit of a contract arising out of a breach of the contract. It becomes the next best performance that maritime perils allow. If, however, the captain is neither able nor willing to complete the voyage, but by every act open to a seaman has thrown it up for good, what is there to prevent the owner of the goods from insisting that he may take

(1) (1838) 9 A. & E. 314, 335, 336.

possession of his own goods, possession of which the master has abandoned? I think it ought to be remembered that these cases lie, logically as well as historically, behind *The Cito* (1) and *The Arno* (2), and that the current of authority ought to be surveyed as a whole.

The matter may be tested in two other ways. The shipowner has a possessory lien on goods shipped on board his vessel to secure the earning and payment of his freight. If he loses possession, what term in the bill of lading contract prevents the cargo owner from taking possession of his own property, or constrains him to ship it over again or to redeliver it to the shipowner for his benefit? No term in fact assuredly, and no authority whatever is forthcoming to support the implication of such a term in law. Now it is clear that if a ship and cargo are left derelict at sea the shipowner loses possession, and with it his lien. The ship and cargo are at large to be taken into the possession of the first salvor. "In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence; but in an ordinary case of disaster, when the master remains in command he retains the possession of the ship. . . . . Unless a vessel is derelict the salvors have not the right as against the master to the exclusive possession of it, even though he should have left it temporarily, but they are bound on the master's returning and claiming charge of the vessel to give it up to him": *Cossman* v. *West.* (3) Again, when a ship is in distress, under certain circumstances the master, though in general only the servant of the shipowner, becomes agent of necessity for the cargo owner to dispose of his cargo, independently of the ship, the voyage and the bill of lading contract. When does this happen? "The agency of the master from necessity," says Parke B. in *Vlierboom* v. *Chapman* (4) "arises from his total inability to carry the goods to the place of destination." How

(1) 7 P. D. 5.
(2) 72 L. T. 621.
(3) 13 App. Cas. 181.
(4) (1844) 13 M. & W. 230, 239

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are these authorities to be reconciled with the view that although the master is so little able to prosecute the voyage or to carry the goods in any way to their destination that he leaves them and the ship out at sea for good, still the cargo owner cannot act as his own agent of necessity, and cannot do what the first salvor can do—namely, take and keep possession of his own goods—but if he meddles at all, becomes an agent of necessity for the shipowner, and must assist him to earn a freight which he cannot earn by himself ?

Cases of derelicts are common enough, but no single decision was produced, in which, under circumstances similar to these, a ship has not been treated as derelict with all the consequences that follow thereupon. Sankey J. found that the ship and cargo were left derelict. I think he was right. Pickford L.J. agreed with him. Bankes L.J. expressed no opinion on the point. Evans P. so found in the salvage action. The judgment of Sargant J. alone holds that the ship was not abandoned, because the master and crew acted involuntarily, and that the facts show no intention on their part to abandon the contract of affreightment on behalf of the shipowners. Even he does not see any ground for supposing that there was any intention of returning to the *Jupiter* or hope of recovering her. Before your Lordships it has also been argued that the ship was not left derelict, because it has not been shown that the master had not some hope or intention of returning to the ship if the enemy left him the chance of doing so. Now as Brett L.J. says in *The Cito* (1), the abandonment of the ship does not put an end to the contract. It is certainly kept alive for the purpose of enforcing causes of action already accrued upon it ; possibly it is kept alive for the purpose of enabling the shipowner to carry on the goods and earn the bill of lading freight, if he can recover possession before the cargo owner has done so or has intimated his election to take his cargo where it lies and not at the port of delivery. This point, expressly reserved in *The Cito* (1) and *The Arno* (2), need not be decided now. I have endeavoured to show that the supposed intention of the master to abandon his owner's contract for him is not material,

(1) 7 P. D. 5 (2) 72 L. T. 621.

and it is clear that the cargo owners elected to take their goods at Leith, subject only to the salvors' claim, at a time when the shipowner had taken no steps to prosecute the voyage or even ascertain that it was possible to do so. What he did was far less than what was done by the shipowners in *The Arno* (1), and yet was held by the Court of Appeal to be ineffectual to prevent the cargo owner from claiming his cargo freight free.

After all, what is the evidence about the abandonment of the vessel? It is all contained in the protest, and it is the master's own tale, in his own words, not cross-examined to and not contradicted. The pleadings and judgment in the salvage action add some significant details as to the ship's state next day but none as to her condition on October 7th. The story cannot now be carried by inference or by speculation beyond where it was left by the master. The ship was fired on by an enemy submarine, but was not hit. Signals were made to the captain to abandon ship. He deciphered the signals; he presumably considered the matter, though probably very rapidly. He saw no possible chance of escape. He decided to obey, and at once gave orders to take to the boats. In all this I assume that he displayed neither lack of courage nor lack of wisdom. He did not try to run; perhaps he did not think of it. He did not try to fight; probably the attempt would have been foolhardy. He decided to do what he thought was the only thing to be done, and I take it that he was right. Still he decided. He decided under duress, but pressure, which would have released him from a contract thereby induced or have negatived any consensus ad idem, is very different from that mechanical action which is illustrated by *Scott* v. *Shepherd* (2) or *The Cosmopolitan* (3) or *The Fenix*. (4) His act was neither unintentional nor involuntary.

At this time it was not dark, but, before the submarine cast off the boats, it had become dark enough for the vessel to be lost sight of. After the boats were left free by the enemy, which was before 7.30 p.m., the master might have put back to look for the vessel; after he was picked up by the *Ayacanora*

(1) 72 L. T. 621.
(2) (1773) 2 Wm. Bl. 892.
(3) 6 Notes of Cases, Supp. xvii.
(4) Swab. 13.

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he might have prevailed on her commander to go back. He believed she had sunk, and did neither; but the fact that he wrongly thought she had foundered does not prevent his action from being voluntary, deliberate and unconstrained. Whether there was a mistake or not on the part of the master, says Dr. Lushington in *The Sarah Bell* (1) is not of the slightest importance, for, assuming it to have been a mistake, his mind was actuated thereby, and the spes recuperandi must be governed by the feelings of the individual's own mind at the time. So in *The Janet Court* (2) Jeune P. took it as obvious, that, if a master believed his ship had been sunk after he quitted her, he could have had no intention of returning although he was in fact wrong, as in that respect the captain always is in salvage cases where the ship is saved. What is clear about the whole story is that in fact he then had neither animus nor spes revertendi, and if he left the ship to her fate for good and all, he did so all the more decidedly because he did actually think that she was no longer on the surface but was at the bottom. My Lords, if a master and crew quit ship and cargo at sea they commit a very grave dereliction of duty, unless the grave peril in which they find themselves justifies their action. Ships are sometimes left without justification, but I feel sure not often; and in my opinion the inference from such an abandonment de facto is that the voyage cannot be further prosecuted. If this is to be rebutted it must be by positive evidence. There is no such evidence here. If all that is proved is that there was an abandonment de facto the presumption is that the master intended to do what he did in fact. He acted as if he had no hope of return; and unless it is proved that he had such a hope it must be taken that he had none. It is not as though salvors were standing by and the captain had remained with them (*The Leptir*) (3), or as if the ship was aground or near the shore, and the crew had gone ashore for their personal safety, but took steps to recover the vessel: *The Clarisse.* (4) Even when a ship is left at sea there is often so far a hope of return that the captain says

(1) 4 Notes of Cases, 144.
(2) [1897] P. 59.
(3) (1885) 52 L. T. 768.
(4) (1856) Swab. 129.

to himself "If I do fall in with possible salvors I will send them back," but, as Dr. Lushington says in *The Coromandel* (1): "It may be perfectly true that "thecaptain and crew" intended, if possible, to employ steamers to go and rescue the vessel. . . . . But is not that the case every day?" This does not prevent the ship from being a derelict when no salvors are sent back. Surely the right of first salvors to possession and control, the right of the crew to salvage remuneration for salvage services, the right of cargo owners to take charge of their own goods, cannot be left in dubio till the interior of the captain's mind is explored, if death has not for ever closed that inquiry. Would the ship have been no derelict if all the crew had been drowned, and evidence was, therefore, unprocurable about their hope or despair of return? Whatever objections there are to the argumentum ab inconvenienti, at least it should dissuade us from applying novel tests to familiar incidents and disturbing the ordinary legal conclusions drawn from well-known nautical conduct. The casualty may take place in one hemisphere and within reach of the shipper; must he stay his hand till the fate of the crew is known and the master's liberty of judgment can be investigated, or till the shipowner, perhaps a foreigner resident in the other hemisphere, hears of the accident and has a chance to intimate one intention or another? A shipowner's first step in such a case is nearly always to abandon his ship to underwriters, and thereby to abandon to them such right as he may have to carry on and earn freight. His election will virtually be not to abandon further performance of the contract. Cargo underwriters insure against loss of cargo by marine perils but not against liability to pay freight. In such a predicament the cargo owner will naturally leave the derelict alone.

Again, when a ship has proceeded but a short distance on her voyage and is abandoned, the shipowner has the minimum of interest in recovering the cargo; the shipper may still be near at hand. Towards the end of the voyage the shipowner may be able to earn a great reward by recovering and delivering at its destination a cargo so damaged as to be

(1) (1857) Swab. 205, 208.

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valueless, though, being still in specie, it may be good enough to earn freight. If so, the cargo owner's interest probably is to rescue the cargo from further transit while there is still time to arrest the damage and pluck something from the disaster. I think it would be lamentable if in these cases the cargo owner were compelled to stay his hand and do nothing to save the cargo, lest having done so he should only saddle himself with a liability for freight which the shipowner himself might never have earned, instead of letting well alone, and claiming a total loss on his insurance policy. It is to the advantage of all parties, and of the public too, that when a ship is known to have been left to her fate at sea no uncertainty about the rights should stand in the way of an energetic attempt to save the cargo.

It is said that every case of marine disaster is legally a question of fact. Be it so. Let it be, too, that the captain and crew had to go. No one blames them; but is the prosecution of the voyage terminated or only suspended according as the captain's motive or his judgment is good or bad? A ship may be a derelict with all the consequences that follow in law, though she was corruptly abandoned and equally a derelict though the captain did it for the best. The owner may be liable in damages to the cargo owner according as he has or has not exceptions of barratry or negligence of the captain in the bill of lading to protect him, but if the mere de facto termination of the voyage produces legal results they follow equally, no matter what the captain's motives may have been. Though the question is one of fact it is one which in typical states of fact can only be answered one way. Negligence in a running-down case is a question of fact for a jury; but there is an abundance of ordinary conjunctures in which a jury's verdict must recognise the ordinary views taken of such facts, or it will be set aside. The fact that the captain and crew had little choice here and virtually had to leave their ship to save their lives is an ordinary incident of derelicts. Whether this is caused by fire or by the King's enemies or by perils of the sea cannot distinguish the cases from one another. They have to leave the ship, and they go,

and the ship is left derelict; and the clearer the compulsion the clearer is the termination of the voyage, unless special circumstances show a spes, not a speculation, revertendi, a plan, not a bare possibility, of leaving the ship the better to procure help and to continue the voyage. For myself, I do not see how the judgment of the majority in the Court of Appeal can be reversed without disregarding *The Cito* (1) and *The Arno* (2), and without taking a view of maritime disaster which will introduce new considerations into all these cases, and I should dismiss the appeal.

LORD PARMOOR. My Lords, the relevant facts for consideration in this appeal are as follows: The respondents are endorsees of Bills of Lading, dated Archangel, September, 1916, and signed on behalf of the appellants, the owners of the *Jupiter*, for the carriage of a cargo of wood to Hull at freight to be paid as per charterparty. When off the coast of Scotland on October 7 the *Jupiter* was captured by a German submarine. The master and crew were compelled to take to their boats under threats from loaded revolvers, and bombs were exploded on board the ship. When last seen by the crew the ship was believed to be sinking, and the captain telegraphed from Aberdeen to the owner on October 8: "Ship sunk yesterday submarine arrived all well Sailors' Home." The ship, in fact, was not sunk, but was picked up by salvors, beached at Newhaven, near Leith, on October 11, and there taken possession of by the receiver of wreck, to whom she was handed over by the salvors. Subsequently there were certain messages and letters, to which frequent reference was made during the argument; but it will be convenient, in the first place, to consider what would have been the respective rights of the parties if there had been no such messages or letters.

The main argument put forward on behalf of the respondents in the statement and points of claim was that the *Jupiter* was abandoned by the master and crew during the voyage to which the contract of affreightment attached, and that such abandonment, without any intention to retake

(1) 7 P. D. 5. (2) 72 L. T. 621.

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possession, gave the cargo owner the right to treat the contract of affreightment as at an end, and that he so treated it. In support of this contention the counsel for the respondents relied on *The Cito* (1) and *The Arno* (2) and *The Kathleen*. (3)

My Lords, I think that the term "abandonment" of a vessel in the ordinary sense denotes some discretion or volition on behalf of the master, and that it is not applicable to a capture, followed by the forcible removal of the master and crew under enemy threats. The vessel was abandoned, not by the master and crew but by the captors, who intended to sink her, but in fact left her a derelict. If this is the right view of the incidents which took place on October 7, it cannot be said that there was in any sense an act done on the part of the shipowner, or his representatives, indicating an intention to repudiate the contract of affreightment such as would entitle the freighter to infer that the shipowner did not intend to carry out the contract and give him a right to treat it as at an end. I agree with Sargant J. that the conditions of this case are toto cælo different from the case of abandonment of the *Cito* or the *Arno*, where the master and crew exercised a discretion to abandon the vessel under stress of the violence of the weather.

In the second place, the counsel for the respondents relied on the fact that the vessel was left as a derelict, and that the consequent inability of the appellants to carry out without interruption the contract of affreightment put an end to that contract. I think that it is impossible to maintain this proposition in general terms. The circumstances of the present case are an apt illustration to the contrary. Assuming, for this purpose, that no subsequent communications had passed between the shipowner and the cargo owner, but that the vessel, in spite of being for a time without a crew, did successfully perform the voyage to Hull for delivery of the cargo at that port, I see no ground on which the cargo owner could have disputed his liability to pay freight under the terms of the contract. The same argument would apply to carriers by land as to carriers by sea. If carriers, who have done no act evincing an intention to abandon the contract of affreightment,

(1) 7 P. D. 5. (2) 72 L. T. 621.
(3) L. R. 4 A. & E. 269.

in fact deliver goods entrusted to them in accordance with the terms of a contract of carriage, freight is not the less payable under the contract if, during the conveyance, the carriers have for a time lost control of the vehicle in which the goods are being carried. Mr. Wright, however, used the additional argument that it was not only a case of temporary inability to perform the contract, but that there was evidence of an intention on the part of the shipowner not to return to the vessel, or take any steps to perform his obligations under the contract. My Lords, I find no evidence of any such intention. The subsequent action of the appellants appears to have been based not on any intention to abandon a floating vessel, but on the mistaken view that the captors had succeeded in sinking the ship after taking off the master and crew, and that the vessel had gone to the bottom of the sea.

A further point, made on behalf of the respondents, was that if a carrier or his representatives had been removed from the vehicle of carriage, whether ship or cart or train, and the freighter finds his goods on such ship or other vehicle, the freighter is then entitled to take possession of his goods and to deal with them in such way as he may think fit, not being under any liability to pay freight to the carrier, since the contract of affreightment had not at such time been completed. My Lords, I think that before a freighter is entitled to take possession of goods which he has entrusted to a carrier for carriage under a contract of affreightment, he must show either that he is exercising a right which the contract has given him, or that the contract itself has in some way been terminated. For reasons already stated, I think that the contract of affreightment had not terminated either through repudiation by the shipowner accepted by the freighter, or by the fact that the vessel in which the goods were being carried was for a time without a crew, and in the terms of the contract the freighter was certainly not entitled to take delivery on the open sea, or at any other port than the port of delivery. No doubt if the shipowner had abandoned the ship and cargo so as to put an end to the contract of affreightment, he could not, by gaining possession of his ship from salvors, revive the

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contract, or establish a right to freight, but these conditions do not apply to the capture of the *Jupiter*, and the forcible removal of the master and crew.

The last point raised on behalf of the respondents depends on the messages and correspondence which passed subsequently to the capture of the vessel. The majority of the Court of Appeal held that these messages and correspondence amount to a statement by the shipowner that he is not in a position to carry out the contract of affreightment, and that, as the freighter acted on this communication, the shipowner, who made it, is bound to observe it. A letter was sent by the shipowner to be communicated to the charterers in the following terms :—

" It is with very great regret I advise you of the loss of my ss. *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew have all been landed safely. Will you kindly advise charterers and oblige."

At the time when the shipowner made this communication he was under the mistaken impression that the *Jupiter* had been sunk. I cannot find anything more in the letter than a communication from the shipowner giving the information which he had received as to the condition of the vessel and crew. I am unable to construe this communication as an intimation of the intention of the shipowner not to carry out the obligation of his contract, or that it was written in such form as to prevent the shipowner stating later that it was sent under a mistake of fact. On October 11 the following telegram was sent on behalf of the respondents :—

" *Jupiter* we represent owners cargo of this steamer recently brought into Leith derelict our clients elect take possession their property where now lying please take note."

This telegram shows that the respondents or their representatives very early ascertained that the shipowner had made a mistake in stating that the vessel had been sunk. On the same day a further telegram was sent to Leith :—

" Steamer *Jupiter* we represent owners cargo understand she is now lying at Newhaven please note our clients claim elect take possession their property where steamer now is please do

not allow cargo to be dealt with except with our sanction please do anything necessary protect property for our clients."

My Lords, the advisers to the respondents were properly astute to protect the interests of their client, but on the assumption that, apart from these communications, the contract for affreightment was still in force, I cannot draw the inference that the message sent by the shipowner under a mistake of fact, read in connection with the subsequent telegrams, is sufficient evidence of an act done by the shipowner indicating his intention to repudiate the contract of affreightment such as would entitle the freighter to put an end to the contract, and to place him in a position to take possession of his goods without payment of freight.

My Lords, in my opinion the appeal should be allowed with costs.

LORD WRENBURY. My Lords, the decision in this case is, in my judgment, to be reached by the application to the facts of certain principles of the law of contract. The application of the principles may not be easy, but the principles themselves are not difficult of statement, and but for the arguments which we have heard are not, I should have thought, capable of serious dispute.

A contract between two persons results from the consensus of the two minds agreeing animo contrahendi to terms which each accepts and which create obligations between them. The contract, having been entered into, may be determined in any one of three ways. First, consensus created the contract, and consensus may determine it. If the two parties agree to determine the contract it is determined. Secondly, some contracts, though expressed in absolute terms, are, by the nature of the matter, so obviously dependent upon the possibility of performing the promise that a term is implied excepting the events which render performance according to the promise impossible. In the case of such events happening the contract ceases to be operative. Thus, in a contract for personal service for a term of years, will be implied a condition if the party shall so long live. Thirdly, if the

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one party to the contract, by words or by conduct, expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance, the latter may say, "I take you at your word; I accept your repudiation of your promise, and will sue you for breach." This is really no addition to, but a particular application of, the principle first above stated. The first party has, in fact, made an offer. This offer is: "I am not going to perform the contract. I offer to end it here and now, and to accept the consequences of ending it, those consequences, as I know, being that you can sue me for damages for my refusal." The other may accept or may decline that offer. If he accepts, then by consensus the contract is determined, but with a right to damages against the party who has refused to perform. In each of these cases it is the consensus of the parties which brings the contract to an end. In the first and third cases it is consensus dehors the contract. In the second, it is the consensus to the implied term contained in the contract.

But it is said in argument there is a fourth way in which a contract of affreightment may be determined, and in this case consensus is not necessary. I hope I state the contention accurately when I say it is this. If the performance of the contract of carriage has ceased by the shipowner abandoning his ship, whether sine animo revertendi or sine spe revertendi, the cargo owner may, if he can, while the ship is derelict or in the hands of salvors, retake possession of his cargo. If he can be first in the field and forestall the shipowner in resuming possession he may take his cargo, and refuse to allow the shipowner to resume the voyage, and may escape payment of any freight, even if the goods, in fact, reach the contractual port of discharge. Let me assume, in the first place, that the shipowner has abandoned his ship sine animo revertendi, that his intention in that respect has, by words or by conduct, been communicated to the cargo owner, and that, before any change of intention has been communicated, the cargo owner has acted upon the expressed intention and accepted it. In that state of facts it seems to me that, upon

the principles already stated, there is a consensus which terminates the contract. But the contention is carried much beyond that. The contention is rested not upon any animus—not upon any intention—but upon a certain fact. "My case," said Mr. Wright in summarizing his argument, "is abandonment in fact and possession claimed by cargo owner before possession re-taken by shipowner." The contention is that if the shipowner's possession has ceased—if the ship is out of the owner's possession—is afloat, but not in the possession of her owner, then, whether the owner's possession has been determined by violence, or has been abandoned voluntarily (whether with or without sufficient cause), the cargo owner may take possession if he can; and, if he does so, will not be liable for freight. The ground upon which the contention is rested is that there has occurred a complete interruption of the contract of carriage, and that, therefore, it results, not that the contract is at an end, but that at the option of the cargo owner it can be brought to an end. My Lords, I cannot accept that proposition.

In order to make clear what my view is of the law applicable to such a case I must say something of what is commonly called "anticipatory breach" of contract. My Lords, the expression is, I think, unfortunate. In *Hochster* v. *De la Tour* (1), the leading case upon this subject, Lord Campbell made no use of the expression in his judgment. It is used several times by Lord Esher in *Johnstone* v. *Milling* (2), but not by either of his colleagues. The words used are, of course, immaterial unless they lead, in course of time, to an erroneous impression. There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor, before that time arrives, says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach

(1) 2 E. & B. 678. (2) 16 Q. B. D. 460.

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is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future. To take Bowen L.J.'s words in *Johnstone* v. *Milling* (1), it is " a wrongful renunciation of the contractual relation into which he has entered." It is the third case which I put above. The result is that the other party to the contract has an option either to ignore the repudiation or to avail himself of it. If he does the latter it is still by consensus of the parties, and not by some superior force, that the contract is determined. I cannot see that the doctrine of what is generally called " anticipatory breach " lends any support to the contention of the respondents in this case. It is no authority for the proposition that anything other than the intention of the contracting parties can either tie or untie the bonds of a contract.

My Lords, I ask myself this question. What consequence results from the following facts without more: (1.) The ship has been abandoned at sea. (2.) Neither shipowner nor cargo owner is in possession; the ship has no one on board. (3.) The shipowner and the cargo owner arrive together at the place where, in fact, the ship is found to be? Which of the two has prior right to take possession? The answer, to my mind, is, that contractually the shipowner is entitled, as against the cargo owner, to take possession of the ship and complete the voyage. It is a wrongful act on the part of the cargo owner to prevent his doing so unless the contract has been determined. He cannot say, I will take possession of my cargo so as to determine it. He can only say, I will take possession of my cargo because the contract has been determined. But the very question is whether it has been determined or not.

Further, upon authority, What is the result of abandonment at sea in itself and without more? Does it put an end to the contract of affreightment? Brett L.J., in *The Cito* (2), says it does not. " Suppose," he says, " a wrongful abandonment, without its being occasioned by the perils of the sea, it is clear that in that case the owner of the cargo might sue the shipowner for his breach of contract, so it cannot be said

(1) 16 Q. B. D. 473. (2) 7 P. D. 8.

that it puts an end to the contract of affreightment." The ground of the decision in *The Cito* (1) seems to me to be clear from Brett L.J.'s next words. "It is sufficient," he says, "I think, for the determination of the present case, to say that, by an abandonment of a ship, without any intention to retake possession of it, the shipowner has, so far as he can, abandoned the contract, so as to allow the other party to it, the cargo owner, to treat it as abandoned." If the ship is abandoned sine animo revertendi, and the cargo owner has accepted that intention, I feel no difficulty in arriving at the conclusion at which the Court of Appeal arrived in *The Cito*. (1) In *The Arno* (2) both Gainsford Bruce J. and Lord Esher rest the case upon the intention of the shipowner.

My Lords, if I am right in these views, there is no fourth way in which a contract of affreightment, as distinguished from all other contracts, is capable of being determined. If it were alleged and shown that every contract of affreightment contains an implied term that the contract of carriage shall be performed continuously, and without any interruption of the shipowner's possession, then I could understand that the respondents might succeed. That would be the second case above stated. But that is not alleged or shown. The respondents did not argue that point. If they had done so I cannot tell whether the appellants might not successfully have contended the contrary. My Lords, under these circumstances, I cannot but reserve my opinion upon that question. I cannot resolve it in favour of the respondents, who did not raise it and give their opponents an opportunity of answering it. It is under these circumstances that I have to apply to the facts of this case the principles applicable to all contracts with which I started.

The facts are that there was a contract of affreightment from Archangel to Hull, and that, in point of fact, the goods were, in the result, and as the result of arrangement, carried in the vessel to the contractual port of discharge. During the voyage—viz., on October 7—the master and crew were removed vi et armis from the vessel by a German submarine,

(1) 7 P. D. 8. (2) 72 L. T. 621.

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which endeavoured to sink, and, as everyone thought, had succeeded in sinking, the ship. The submarine towed the master and crew five miles from the spot, and there cast them adrift. Night was coming on, and everyone thought the ship was at the bottom of the sea. The crew were picked up, and from Aberdeen they telegraphed, on October 8, to their owner that the ship had been sunk by a submarine. Later in the same day the master wrote to his owner that he had heard in the evening that the ship was in tow, but that it was doubtful whether they (the salvors) would salve her. That letter will have reached the owner, presumably, on October 10. On October 8, after receipt of the telegram (but, of course, before receipt of the letter), the owner wrote to the brokers who had effected the charter advising them of the loss of the ship (which he, of course, then believed, but erroneously, to have been sunk), and asking them to advise the charterers of the fact. On October 9 the brokers wrote to the charterers accordingly. On October 11, about 10.35 a.m., the owner was informed that the ship had been taken to Leith. In fact, she was at Newhaven, near Leith. At 5.5 p.m. he started by train for Leith. In the interval—viz., about 2.47 p.m.—he received a telegram from the solicitors of the charterers. The charterers, having learned somehow that in point of fact the ship had not been sunk, telegraphed, by their solicitors, to the shipowner that the ship had been brought in, and that they elected to take possession of the cargo. The shipowner, by letter the same evening, wrote that he was going to bring the cargo forward to its destination. The position, therefore, is as follows: The shipowner tells the charterers the ship is sunk; the charterers reply, "She is not sunk, but we avail ourselves of your erroneous belief that she is sunk, and determine the contract." The shipowner replies: "You cannot do that. I find she is not sunk. I am going to perform." There is not much consensus about that. It comes to this. The owner says, "I was always ready and willing to perform. I thought performance had become impossible, and I said so." That is all. Unless the case turns not upon intention but on the fact that the

owners were out of possession, it seems to me that the respondents cannot succeed.

There is another ground upon which the contention was sought to be rested, and that was inability to perform. Intention not to perform, or inability to perform, raises, it is said, the right of the cargo owner to treat the contract as at an end. If there was inability to perform, if the contractual act had become impossible, then, upon the second ground above stated, the contract would no doubt determine by the operation of an implied term, that if the act proved to be impossible the contracting parties were not bound. But the point is not open upon the facts of the present case. The contractual act had not become impossible, and the cargo owner, when he acted, knew that it had not become impossible. The shipowner's letter of October 8 was not, I think, an expression of intention at all, but, assuming that it was, it results only in this. The shipowner, I will assume, says: "My contract has become impossible; I am not going to perform it." The cargo owner replies: "Your expression of intention not to perform is made in ignorance of the real facts; the contract has not become impossible, but I will accept your expression of intention, and will elect to determine the contract." To say that that is a consensus to determine the contract seems to me impossible.

My Lords, in my view, abandonment at sea is not an operative cause, but only evidence, although it may no doubt be strong evidence of intention. If the owner voluntarily abandons at sea it may well be that the onus is on him to show the animus revertendi. If he abandons only in the sense that he is compulsorily dispossessed by violence, the abandonment, or, as I prefer to call it, the dispossession, does not in itself effect anything in affecting the contract. If the owner, having been dispossessed by violence, does, by words or by conduct, express an intention not to seek to regain possession, no doubt the option arises in the cargo owner to treat the contract as at an end. Nothing of that kind arose here. The owner did not abandon in any way as an act of volition; having been dispossessed by violence, he did no act to express

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an intention not to seek to regain possession. He did, in fact, seek to regain possession, and, subject to the prior rights of the salvors, I think he was entitled to take it. For these reasons I think that the appeal must be allowed and judgment entered for the appellants upon the claim, and for 14,050*l.* 2*s.* 9*d.* upon the counterclaim, with costs of both claim and counterclaim.

Order of the Court of Appeal reversed and judgment entered for the appellants upon the claim, and for 14,050*l.* 2*s.* 9*d. upon the counterclaim. The respondents to pay the costs in the courts below, and also the costs of the appeal to this House.*

Lords' Journals, July 29, 1918.

Solicitors for appellants: *Downing, Handcock, Middleton & Lewis.*

Solicitors for respondents: *William A. Crump & Son.*

[HOUSE OF LORDS.]

RODRIGUEZ . . . . . , . APPELLANT;

AND

SPEYER BROTHERS . . . . . RESPONDENTS.

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1918
August 2.

Alien Enemy—Disability to sue—Partnership—Alien Enemy Partner—Action in Partnership Name—Whether maintainable.

The rule which disables an alien enemy from suing in this country does not apply to an action in which, for the purposes of winding up the affairs of a partnership dissolved on the outbreak of war by reason of one of the partners having become an alien enemy, the latter is joined as a co-plaintiff.

So held by Lord Finlay L.C., Viscount Haldane, and Lord Parmoor; Lord Atkinson and Lord Sumner dissenting.

Where, therefore, a firm carrying on business in London was dissolved on the outbreak of the war with Germany by reason of one of the partners having become an alien enemy, and during the continuance of the war an action was commenced for a debt alleged to have become due to the firm prior to the war, and judgment was signed against the defendant in default of appearance:

Held (by the same majority), that the action was maintainable; but in the circumstances the action was remitted to the Master for rehearing on the merits.

Mercedes Daimler Motor Co. and Daimler Motoren Gesellschaft v. *Maudslay Motor Co.* (1915), 32 R. P. C. 149; 31 Times L. R. 178 and *Rombach* v. *Gent* (1915), 84 L. J. (K. B.) 1558; 31 Times L. R. 492 approved.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing an order of Peterson J. in chambers.

The respondents carried on business in partnership as bankers in London until the outbreak of the war, when the partnership was ipso facto dissolved owing to one partner having become an alien enemy. There were five other partners, of whom four were British subjects and the fifth was an American citizen.

An action was commenced in 1916 by the respondents in the partnership name against the appellant for recovery of a

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SUMNER, and LORD PARMOOR.

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debt alleged to have accrued before the war. Judgment was signed by the respondents against the appellant in default of appearance, but this judgment was set aside by the Master upon the ground that the respondents had no right to sue, and the order of the Master was confirmed by Peterson J. The Court of Appeal, by a majority (Bankes L.J. and Sargant J., Pickford L.J. dissenting), set aside the orders of the Master and the learned judge, and remitted the case to the Master for rehearing on the merits. (1)

1918. June 17, 18, 20, 21, 24. *Douglas Hogg, K.C.* (with him *Giveen*), for the appellant. The question is as to the right of an alien enemy who was a member of a firm with British partners to maintain an action in conjunction with his partners during the continuance of the war for the recovery of a debt due to the firm. The appellant submits that the action cannot be maintained. The rule as laid down in Coke upon Littleton, pp. 129 a and b, s. 198, is that an alien enemy shall maintain neither real nor personal action until the nations be at peace. An alien enemy can derive no benefit from our laws, and has no rights or privileges, except by the King's special favour, during the time of war. He is wholly incapacitated from suing either at law or in equity, for he cannot invoke the assistance of the King's Courts; and this is a personal disability inherent in the character of alien enemy: 1 Dyer, 2b, c. 8; Blackstone's Commentaries, book 1, c. 10; *The Hoop* (2); *Daubigny* v. *Davallon* (3); *Le Bret* v. *Papillon* (4); *Albrecht* v. *Sussman* (5); *Alcinous* v. *Nigreu*. (6)

It is immaterial that the alien enemy is suing jointly with others (*M'Connell* v. *Hector*) (7), or that the ultimate result may not be actually to put money into his pocket (*Brandon* v. *Nesbitt*) (8), and the disability extends to every action by, or in favour of, the alien enemy: *Brandon* v. *Nesbitt* (8);

(1) 87 L. J. (K. B.) 171. A report of the decision of the Court of Appeal was prepared for the *Law Reports*, but was not published owing to the continued illness of the reporter.

(2) (1799) 1 C. Rob. 196, 198, 200.
(3) (1794) 2 Anstr. 462, 467.
(4) (1804) 4 East, 502.
(5) (1813) 2 V. & B. 323, 327.
(6) (1854) 4 E. & B. 217.
(7) (1802) 3 B. & P. 113.
(8) (1794) 6 T. R. 23.

Bristow v. *Towers*. (1) Those cases are conclusive in the appellant's favour. This rule is subject to a possible exception where the alien enemy is suing as a bare trustee, but as to that there are authorities both ways. In two anonymous cases decided in 1589 (see Owen's Rep. 45 and Cro. Eliz. 142, c. 7) the claim of an alien enemy to sue as executor was rejected; but in *Brocks* v. *Phillips* (2), *Richfield* v. *Udal* (3), and *Villa* v. *Dimock* (4), the claim was allowed. In D'Anvers' Abridgement, p. 325, tit. "Alien," "Pleader," and in Comyns' Digest, p. 39, tit. "Abatement (E4.)"; p. 548, tit. "Alien" (C5.), the existence of the right is denied. In Wentworth on Executors, p. 19, and in Bacon's Abridgement, p. 181, tit. "Aliens (D)," the point is treated as doubtful. But the exception, assuming that it exists, is put upon the ground that the executor is suing en autre droit, and has no application to the present case. The majority of the Court of Appeal have proceeded upon the view that this question of inability to sue depends upon public policy, and that it is more to the interest of the nation that the five English partners shall recover their share of the debt than that the German partner shall not recover. But, first, this is a question not of public policy but of personal disability; and, secondly, it is not open for a judge to start a new ground of public policy based upon his own individual views of what is for the public weal: *Janson* v. *Driefontein Consolidated Mines* (5); *Porter* v. *Freudenberg* (6); *Continental Tyre and Rubber Co.* v. *Daimler Co.* (7), per Buckley L.J., whose view was upheld by the House of Lords. (8) In *Actien-Gesellschaft für Anilin-Fabrikation and Mersey Chemical Works* v. *Levinstein* (9) it was held that an appeal by two co-plaintiffs, one of whom had become an alien enemy before the hearing of the appeal, must be suspended during the war; and in *Candilis & Sons* v. *Victor & Co.* (10), which was an action by a firm

(1) (1794) 6 T. R. 35.
(2) (1599) Cro. Eliz. 683.
(3) (1667) Carter, 48, 191.
(4) (1694) Skin. 370.
(5) [1902] A. C. 484, 496, 499.
(6) [1915] 1 K. B. 857, 869-873.
(7) [1915] 1 K. B. 893, 918.
(8) [1916] 2 A. C. 307.
(9) (1915) 31 Times L. R. 225; also reported in 84 L. J. (Ch.) 842.
(10) (1916) 33 Times L. R. 20.

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consisting of three partners of which two were alien enemies, the Court ordered a stay of proceedings. Those two cases are directly in point. *Mercedes Daimler Motor Co.* v. *Maudslay Motor Co.* (1) is treated by Pickford L.J. as a decision that the German company had no real interest in the case, and were merely trustees for the English company; and, so treated, it is not adverse to the appellant's contention. *Rombach* v. *Gent* (2) was based upon the view that the action was in substance an action by the receiver acting under the authority of the Court, and upon that hypothesis is not an authority against the appellant; but Pickford L.J. doubts the correctness of that decision. It is suggested that the appellant's objection to the action is merely a matter of form, and that the difficulty could have been got over by making the alien enemy a co-defendant; but that is not so, as the judgment would be really a judgment in his favour, as is shown by the form of judgment in *Cullen* v. *Knowles*. (3) In most of the cases above cited two questions arise—one, a question of public policy as to trading with the enemy; the other, the question of the personal disability to sue. The rule that an alien enemy is incapable of suing in the King's Courts is an absolute rule of law, and is independent of public policy. If the rule is found to be inconvenient it is for the Legislature to alter the law, as has, in fact, been done by the Emergency Legislation.

[He also referred to *Ex parte Boussmaker* (4); *Kensington* v. *Inglis* (5); *Flindt* v. *Waters* (6); *Shepeler* v. *Durant* (7); *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* (8).]

Romer, *K.C.*, and *Hon. M. Macnaghten* for the respondents. The rule that an alien enemy cannot sue is founded on public policy, and this case falls either within one of the exceptions which have been recognised by the Courts or within the principle of those exceptions. The crucial question in each

(1) 31 Times L. R. 178; also reported in 32 R. P. C. 149.
(2) 31 Times L. R. 492; also reported in 84 L. J. (K. B.) 1558.
(3) [1898] 2 Q. B. 380, 382.
(4) (1806) 13 Ves. 71.
(5) (1807) 8 East, 273.
(6) (1812) 15 East, 260.
(7) (1854) 14 C. B. 582.
(8) [1918] A. C. 239.

case is: Whose in substance is the action? The right to sue and the right to trade exist together. The right to trade necessarily involves the right to sue. The law forbids an action which is in substance an action by an alien enemy; it permits an action which is in substance an action by British subjects, notwithstanding that an alien enemy may be joined. The test is whether the action, if successful, will lead to the enrichment of the enemy during the war. The rule as to disability ought not to be so applied as to prevent British subjects from maintaining an action for the protection of their rights. There is no rigid inflexible rule that an alien enemy cannot, under any circumstances or in any capacity, be a plaintiff in the King's courts. The authorities show that an action may be maintained by an enemy executor (Williams on Executors, 7th ed., vol. 1, p. 230*n.*; *Watford* v. *Masham* (1); *Caroon's case* (2); *Brocks* v. *Phillips* (3); *Richfield* v. *Udal* (4); *Villa* v. *Dimock* (5); and see *Hix* v. *Harrison* (6)), or by an enemy trustee: *Daubuz* v. *Morshead.* (7) The principle of these decisions is that actions en autre droit are excepted from the rule as to disability to sue: Lush's Practice, 3rd ed., p. 4. Assuming that the rule depends upon public policy the course of policy changes with the change in modern conditions of life (*Nordenfeldt* v. *Maxim-Nordenfeldt Guns and Ammunition Co.* (8); *Daimler Co.* v. *Continental Tyre and Rubber Co.* (9)), and it would be contrary to public policy at the present time to deprive an English firm carrying on business in England of their right to sue for a partnership debt because one of the partners has become an alien enemy. The case of an executor or trustee is analogous to this case, where five British subjects are using the name of an alien enemy for the purpose of recovering a debt substantially for their benefit. *Rombach* v. *Gent* (10) directly applies. Under the Emergency Legislation the custodian might have joined as a co-plaintiff in this action:

(1) (1595) Moore, 431.
(2) (1625) Cro. Car. 8.
(3) Cro. Eliz. 683.
(4) Carter, 48, 191.
(5) Skin. 370.
(6) (1616) 3 Bulstr. 210.
(7) (1815) 6 Taunt. 332.
(8) [1894] A. C. 535, 546, 553, 562.
(9) [1916] 2 A. C. 307, 344, 347.
(10) 31 Times L. R. 492.

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Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 4; Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), s. 4. And an action cannot be said to be against public policy if the Legislature allows the same thing to be done through the medium of the custodian.

Further, this is not a disability of which the Court will take judicial notice; it must be the subject of a plea: *Ex parte Boussmaker* (1); *Shepeler* v. *Durant.* (2) It follows that there cannot be any such personal disability as has been contended for by the appellant. Here judgment having been obtained by default, it is now too late to raise the plea.

Douglas Hogg, K.C., replied.

[The following authorities were also referred to: Lindley on Partnership, 8th ed., c. 5, p. 402; Hall's International Law, 7th ed., p. 490; *Cornu* v. *Blackburne* (3); *Anthon* v. *Fisher* (4); Pollock and Maitland's History of English Law, Book II., c. 2, s. 6; Selden Society's Publications, vol. 10, Select Cases in Chy., p. 62; *Tingley* v. *Müller.* (5)]

The House took time for consideration.

Aug. 2. LORD FINLAY L.C. My Lords, the question in this case is whether a judgment signed against the present appellant, in default of appearance, should be set aside on the ground that one of the plaintiffs is an alien enemy. The majority of the Court of Appeal have held, against the Master and judge, that it should not be set aside on this ground, but should be remitted to the Court below for inquiry whether it should be set aside on the merits. The respondents (the plaintiffs in the action) carried on business as bankers in London until the outbreak of the war, when the partnership was ipso facto dissolved, as one member of the firm, Eduard Beit von Speyer, was a German resident in Germany, who on the outbreak of the war became, and is now, an enemy alien. There were five other members of the firm—the leading

(1) 13 Ves. 71.
(2) 14 C. B. 582.
(3) (1781) 2 Doug. 640.
(4) (1782) 2 Doug. 649 n.
(5) [1917] 2 Ch. 144.

member, Sir Edgar Speyer, and H. Oppenheimer, both naturalised British subjects, H. W. Brown and H. Gordon Leith, both British subjects, and James Speyer, an American citizen.

The action was commenced in the name of the firm Speyer Bros. by a writ dated January 18, 1916, for the recovery of a debt which is alleged to have accrued due before the war, on February 19, 1914. The appellant was the defendant in the action. He resides at Buenos Aires, where he was served pursuant to leave to effect service out of the jurisdiction. The appellant failed to enter an appearance, and judgment was signed by plaintiffs, the respondents, for 29,772*l.* 9*s.* On March 29, 1917, the respondents obtained an order nisi charging the appellant's interest in certain shares, and also an order giving leave to serve notice of an application for the appointment of a receiver on certain property of the appellant. Notice was served on the plaintiffs to declare the names and places of residence of the members of the plaintiff firm, and on October 6, 1917, a statement was delivered setting out the names of the members of the firm, which I have already mentioned, one of them being that of Mr. Eduard Beit von Speyer. It appears from the articles of partnership that his interest is $2\frac{1}{2}$ per cent. in profits and losses, and he is indebted in a large sum to the firm.

On application to set aside the judgment and the orders under it, the Master on August 1, 1917, made an order setting them aside, and this was affirmed on August 7, 1917, by Peterson J. The respondents appealed to the Court of Appeal, which by a majority reversed the decision and restored the judgment and orders, remitting the summons to the Master to be re-heard on the merits. The defendant brings this appeal to your Lordships' House asking that the judgment and orders under it should be set aside as directed by the Master and Peterson J.

On the dissolution of the firm on the outbreak of the war the affairs of the partnership had to be liquidated, and this, of course, involved getting in the assets. For the purpose of the liquidation the firm still existed, and the other partners

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had the right to use the name of Eduard Beit von Speyer in any litigation necessary for the purpose of getting in the assets. The writ was in the name of the firm, which had the same effect as if the names of the individual partners had been set out.

It was contended for the appellant that the respondents' action is incompetent, on the ground that Eduard Beit von Speyer is a co-plaintiff, and that an enemy alien cannot sue in the King's courts. This contention depends on the proposition that there is an inflexible rule of law against any action in the King's courts by an alien enemy suing either alone or together with others. Peterson J. at Chambers, and Pickford L.J. in the Court of Appeal, held that there is a settled rule of law to this effect, while Bankes L.J. and Sargant J. held that the rule does not apply in such a case as the present.

There is no doubt that, as a general rule, an alien enemy cannot bring an action in the King's courts as plaintiff, though he may, of course, be made a defendant. The rule seems to have its origin in two considerations. Firstly, that the subject of a country then at war with the King is in this country, unless he be here with the King's permission, exlex, and that he cannot come into the King's courts to sue any more than could an outlaw; and secondly, that the King's courts will give no assistance to proceedings which, if successful, would lead to the enrichment of an alien enemy, and therefore would tend to provide his country with the sinews of war. The rule is founded on public policy; but any such rule of law must be observed, even if there are circumstances in any particular case which make its enforcement contrary to public policy, and indeed detrimental to the interests of this country. If, however, there may be a state of circumstances in which to prevent an alien enemy from being a party to an action as plaintiff would do much more harm to British subjects or to friendly neutrals than to the enemy, this is a consideration most material to be taken into account in determining whether such a case falls within the true scope and extent of the rule. If the particular

case is outside the rule, to apply it might be not merely contrary to public policy but also a mistake in law.

It was urged in support of the decision of the Court of Appeal in the present case that, where there is a firm consisting of British subjects and an alien who becomes an enemy on the outbreak of war, the partnership is ipso facto dissolved, and that to apply the supposed rule to such a case would cause great inconvenience and possibly most serious loss to the British members of the firm, by making it impossible for them to get in the firm's assets. The question raised is one of great interest, and involves a close inquiry into the precise nature and extent of the rule of law on the point.

One answer given to the argument ab inconvenienti was that the Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), has by s. 4 provided machinery by which this inconvenience may be obviated by vesting the interest of the enemy alien in the custodian appointed under the earlier statute of 5 Geo. 5, c. 12, who might join as a co-plaintiff so as to get in the assets. The question, however, must be considered apart from the effect of this Act, as the rule of law on the subject must have come into existence long before the passing of these Acts for the custody of enemy property, which have had the incidental effect of providing a method by which the difficulty in question might be got over. If the 5 & 6 Geo. 5, c. 105, had been passed specifically with the object of removing this difficulty, it would, of course, have afforded most cogent ground for the conclusion that the difficulty existed, but no such conclusion can be drawn from the fact that legislation of a general nature for the custody of enemy property may incidentally have this effect. I therefore propose to consider the question what the rule of law is, apart from the legislation of 1915 and 1916.

The proposition that an alien enemy cannot bring an action in this country has been often laid down. The question which now for the first time falls to be determined is whether the rule forbidding such an action during the continuance of the war is unqualified, and, in particular, whether it applies to a case in which, for the winding up of the affairs of a

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partnership dissolved by the outbreak of war, there is joined as a co-plaintiff one who, having been a partner when war broke out, thereon became an enemy alien. There is no doubt that, as a general rule, an action by an alien enemy might be met by a plea in abatement, while a contract made with an alien enemy during the war was void, and might be met by a plea in bar. But the general terms in which the rule has been laid down do not carry us very far in dealing with the special circumstances of the present case. The question is whether the rule applies so as to prevent British subjects during the war from recovering a debt which had been contracted in their favour jointly with one who has since become an enemy. It is obvious that, if the rule does extend to such a case, British partners could not get in their assets until the war was over. They would be non-suited for not having joined their co-contractor as a plaintiff if they left him out, and the action would be stopped by a plea in abatement or on summons if they put him in.

There is another consideration to be taken into account if the co-contractors were partners. When a debt due to the firm is got in no partner has any definite share or interest in that debt; his right is merely to have the money so received applied, together with the other assets, in discharging the liabilities of the firm, and to receive his share of any surplus there may be when the liquidation has been completed. Eduard Beit von Speyer has no right to any part of the 29,772*l.* said to be due from the appellant, if that sum should be recovered. His interest can be finally ascertained only when the liquidation has been completed, and it consists of his share of the surplus. He may be benefited as a consequence of the action by the reduction of his indebtedness to the firm as a whole, or conceivably by his getting some part of any surplus when the winding up has been completed. But he has no right to any part of the sum recovered.

In the present case the action has been brought in the name of the firm; that is, in the name of all the partners. It would, I think, have been open to the five partners who are not enemies to bring the action in their own names as

plaintiffs, joining Eduard Beit von Speyer as a defendant. The rule laid down by Bigham J. in *Cullen* v. *Knowles* (1), that one of two joint promisees can maintain an action on the contract, making the other joint promisee defendant, if, after the tender of an indemnity against costs, he refuses to be joined as a co-plaintiff, would be just as applicable in the case of the supposed disability of a co-contractor as an alien enemy as it is in the case of such a refusal of a co-contractor to join in suing. Such an action would result in judgment for the five non-enemy partners and Eduard Beit von Speyer, the co-defendant, against the other defendant in the action, but no part of the money would reach the hands of Eduard Beit von Speyer, who would have no right to it, and indeed to pay it over to him during the war would amount to a crime. There would be no infraction in such a case of any rule that an alien enemy cannot be a plaintiff. The enemy alien has been made a party as defendant merely because his presence is necessary for enforcing the rights of the other members. In the present case the other five partners had, as between themselves and Eduard Beit von Speyer, the right of joining him as a co-plaintiff: *Whitehead* v. *Hughes* (2), and per Rigby L.J. in *Tomlinson* v. *Broadsmith*. (3) No rule against suits by enemy aliens could prevent his being joined as defendant with the result I have described; and to say that under such circumstances he could not be made a co-plaintiff would be to convert a rule of public policy into a mere technicality of procedure. The truth is that the rule was one directed against alien enemies and not against British subjects or friendly neutrals. Eduard Beit von Speyer is not, in point of law, a trustee, but he is under the obligation to concur in getting in the assets for the benefit of the firm, and there is no case in which the rule against an enemy alien being allowed to sue has been applied to a case in which he is suing not in his own interest, but because his concurrence is necessary for the protection of the interests of the firm. He is not, in

(1) [1898] 2 Q. B. 380. (2) (1834) 2 C. & M. 318.
(3) [1896] 1 Q. B. 386, 392.

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point of law, suing en autre droit, but he is under a legal obligation to concur as a necessary party to an action which must be brought in the interests of the firm, and in these circumstances, in my opinion, his presence either as plaintiff or defendant gives rise to none of the objections which have been raised to suits by alien enemies.

A great deal of the argument at the Bar of your Lordships' House has been directed to the question whether an alien enemy might sue as executor or administrator. The fact that an alien enemy might sue as executor or administrator could not be put as decisive of the present case, but it would have, I think, some bearing on the question whether he can be joined as a plaintiff in such a case as the present.

A good many authorities were cited to your Lordships on the subject of alien enemies as executors and administrators. I have examined all of them, but for the present purpose it is enough to say that I agree with the opinion expressed by the very learned author of Williams on Executors (Sir E. V. Williams) in the edition of that work published in 1832 (in a note at pages 114 and 115), that the weight of authority is not in favour of the view that an alien enemy executor is unable to sue. Some further support is given to the view that an alien enemy can sue as executor or administrator by the fact that it appears always to have been held that persons attainted or outlawed may sue as executors because they sue en autre droit and for the benefit of the estate. (See Williams on Executors, 1832 ed., p. 119, and 10th ed., vol. 1, p. 161.) Of course it is possible that the law of England is such that until s. 4 of the Trading with the Enemy Amendment Act, 1916, was passed, a debt due to a firm could not be got in by adding the enemy alien either as co-plaintiff or as co-defendant. It appears to me, however, that none of the reasons for the rule of law against actions by alien enemies applies in such a case, and that there is no authority for saying that it does. It would, indeed, be utterly unreasonable that the law should be that the debt could be got in by making the alien enemy a co-defendant, but that he could not be a co-plaintiff. The debtor to the

firm may be himself an alien enemy, and according to the doctrine contended for by the appellant he might by English law, until 1916, have avoided during the existence of a state of war the payment of a debt due to a firm in which the partners, all but one, were British, on the ground that one necessary co-plaintiff was, like himself, an alien enemy, and that the firm could not sue either with him or without him. One would be slow to come to the conclusion that any system of law brought about a result so whimsical. Any personal disability on the part of an alien enemy can hardly apply to a case where he is brought in as a party for the benefit of the other partners, British or neutral, and there is no danger of the alien enemy's being enriched by the proceedings, as none of the assets of the firm can be handed over to him during the war. To apply the rule against suing to such a case would be to inflict hardship not on the enemy but on British and neutral partners. Of course if a definite and inflexible rule of law has been established, though based on considerations of public policy, that rule must be applied even in cases where its application is mischievous and against public policy. But the question is whether the rule does exist in a class of cases manifestly not within the mischief at which the rule is aimed.

The citation of the numerous passages in which the disability of an alien enemy to sue has been laid down is not much to the purpose. It has never before been applied to such a case as the present, and all such passages must be read with reference to the question under discussion in the case in which the judgment was pronounced. A great many cases decided during the eighteenth and nineteenth centuries were quoted in argument. I have prepared an abstract of these authorities, but I shall not lengthen this judgment by setting it out. I desire only to make a few observations upon three of these cases—viz., *Brandon* v. *Nesbitt* (1); *The Hoop* (2); and *M'Connell* v. *Hector*. (3) A great deal was said in argument as to *Brandon* v. *Nesbitt* (1), but that case does not appear to

(1) 6 T. R. 23. (2) 1 C. Rob. 196.
(3) 3 B. & P. 113, 114.

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me to throw light upon the point now under consideration. As was pointed out by Lord Ellenborough in *Flindt* v. *Waters* (1), in *Brandon* v. *Nesbitt* (2) the parties interested had become alien enemies before the voyage insured was performed and the loss happened, and what was there decided was that this might be pleaded in bar. The voyage insured was illegal, as was said by Bayley J. in the same case. (3) What we are here concerned with is the effect of the plaintiff's having become an alien enemy after the liability had accrued, and this could have been raised only by plea in abatement.

In the well-known case of *The Hoop* (4) Sir William Scott laid down that any trading with the enemy was illegal. He said (pp. 200–201) that there was a total inability on the part of the subjects of enemy countries to appeal to the tribunals of the country with which their own was at war, and that an enemy alien is totally exlex, using this as an argument to show that there cannot be a state of legal commerce between the two countries. The passage is a classical exposition of the general doctrine as to enemy aliens, but is not directed to the question whether it applies under the special circumstances with which we are here concerned.

M'Connell v. *Hector* (5) was an action of trespass for the purpose of trying the question whether the commission of bankruptcy was valid, it having been issued on the petition of the defendant, who was resident in England, on behalf of himself and his two partners, who, though British, were resident and carrying on trade in an enemy country. A verdict was found for the plaintiff with leave to move. A rule was moved for accordingly upon the point that mere residence in an enemy country did not constitute a British subject an alien enemy. As Lord Alvanley C.J. said: "The question is, whether a man who resides under the allegiance and protection of an hostile State for all commercial purposes, is not to be considered to all civil purposes as much an alien enemy as if he were born there?" Rooke J. pointed out that the reason of the disability to sue of

(1) 15 East, 265.
(2) 6 T. R. 23.
(3) 15 East, 267.
(4) 1 C. Rob. 196.
(5) 3 B. & P. 113, 114.

a person residing in an enemy country is that the fruits of the action may not be remitted to a hostile country, and so furnish resources against this country. All that was decided by the Court was that enemy character results from residence in the enemy country, and there is no doubt as to the correctness of this proposition. The ruling of the Chief Justice at the trial was that a debt due to a firm consisting of a partner residing in England and of two enemy aliens could not be recovered by action, and therefore could not support a commission of bankruptcy. It is to be observed that the majority of the partners bringing the action were, in contemplation of law, alien enemies, and the action was brought by them to enforce their rights. It was not a case where the enemy alien was joined as a plaintiff merely for the protection of the interests of British creditors. In none of the older cases cited did the question now before your Lordships present itself for decision, but in the course of the present war there have been several cases relating to disability of enemy aliens to sue, some of which are in point.

The subject of actions by enemy aliens was discussed generally by Lord Reading C.J. in his judgment in a group of cases which are reported together: *Porter* v. *Freudenberg*, *&c.* (1) He affirmed the proposition that a person voluntarily resident in, or carrying on business in, an enemy country is an alien enemy, that an alien enemy, while he cannot sue, may be sued, that an alien enemy who is plaintiff in an action commenced before the outbreak of war has no right of appeal pending the war, and that an alien enemy who is defendant has the right to appeal against any decision that may have been given against him. The question of the right of an alien enemy to sue en autre droit did not arise, and is not dealt with in the judgment of the Lord Chief Justice, nor is the question which arises in the present case—how far an alien enemy, who has ceased to be a partner owing to the outbreak of war, can be made a co-plaintiff for the purpose of getting in the assets of the firm for the benefit of British or neutral partners. Lord

(1) [1915] 1 K. B. 857.

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Reading's judgment in these actions was delivered on January 19, 1915. On the 26th of the same month the case of *Mercedes Daimler Motor Co. and Daimler Motoren Gesellschaft* v. *Maudslay Motor Co.* (1) came before Warrington J. The plaintiffs were an English company and a German company, and the action was brought for the infringement of a patent of which they were the joint owners under a deed which contained the following clause: "The British company shall have the sole right of bringing actions or other proceedings to restrain the infringement of or otherwise protecting the rights granted by all or any of the Letters Patent . . . . and for such purposes may, upon first giving to the German company 21 days' notice of its intention so to do, join the German company as co-plaintiffs with the British company in any such proceedings, and the British company shall have the sole conduct and control of any such action." When the case was called on the objection was taken that the plaintiff German company had become an alien enemy, and that the action ought to be suspended. The judgment of the learned judge is reported as follows:— "Mr. Justice Warrington said that this was a somewhat peculiar case. Clause 9 of the deed of May 1, 1908, showed that as between the English company and the German company the proceedings, though brought formally in the names of the two companies, were really brought by the English company. The German company had nothing to do with bringing the action; they might have objected to the action's being brought, but they had not done so. The important point was that, although the patent was in the names of the two companies, the person to protect the patent was the English company. To deny the English company the right to prosecute this action would be to deny the right to a British subject to bring an action for his own protection." This judgment seems to me to have been right. The learned judge allowed the action to proceed in the name of the English company and of the German company as co-plaintiffs, on the ground that the action was for the protection of the English company, and that to deny the English company the right to

(1) 31 Times L. R. 178.

prosecute it would be to deny the right of a British subject to bring an action for his own protection. To hold that the doctrine of disability applies to a case in which an enemy alien cannot during the war reap any benefit from the action, and where the action is really for the benefit of the other partners, would, I think, involve a misconception of the principle and extent of the rule, and, before the Trading with the Enemy Amendment Act, 1916, might have inflicted very serious loss upon British subjects. In these cases the substance of the matter must be looked at.

On June 15 in the same year (1915) the case of *Rombach* v. *Gent* (1) was decided by Lush J. Mr. J. B. Rombach was a German residing in Germany, who, up to May, 1914, had carried on business in England under the name of "The J. B. Rombach Baden Clock Company," the business being managed by his two sons. It was proved that in May, 1914, a deed was entered into by which the English business became the property of a firm consisting of J. B. Rombach and his two sons. The action comprised a claim for goods sold to the defendant since the creation of this partnership. It was proved that since the war one of the sons, Mr. Theophil Rombach, had brought an action claiming a dissolution of the partnership, and that an order of Court had been made appointing him the receiver of the partnership business. Lush J., in giving judgment, said that the *Mercedes Daimler* case (2) was analogous to the case before him. "The receiver brought the action under the protection of the Court. It was true that he had had to join his two partners, but it was the receiver's action in substance, and it was impossible to say that it was brought for the benefit of a firm one of whom was an alien enemy." Lush J. also referred to the case of *Ex parte Boussmaker*. (3) "On these grounds, looking at the substance and not at the form of the case, his Lordship thought that the action was maintainable." His Lordship referred to the fact that the money when recovered would be subject to the order appointing the receiver. This is a direct decision that the

(1) 31 Times L. R. 492. (2) 31 Times L. R. 178.
(3) 13 Ves. 71.

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rule of the disability of an alien enemy to sue has no application to a case where the firm has been dissolved by the outbreak of war, and that the name of the alien enemy ex-partner might be used as a co-plaintiff for the purpose of getting in the assets. In the judgment as reported I think undue stress is laid on the fact of the existence of the order appointing Mr. Theophil Rombach receiver. That order of course showed that there was no danger of the proceeds of the judgment finding their way to an alien enemy during the war. But this would have been prevented by the ordinary criminal law. I think that the decision was right on the ground that the law does not prohibit the use of the name of an alien enemy, who has been a partner with British subjects, when it is necessary for getting in the assets of the firm.

During the present war there have been two cases in the Court of Appeal, both of which were referred to in argument. The first is *Actien-Gesellschaft für Anilin-Fabrikation and the Mersey Chemical Works* v. *Levinstein* (1), which was decided in the Court of Appeal in February, 1915. The action was brought by a German company and an English company alleging infringement of patents which had been vested in the German company and had been assigned to the English company. The Court had dismissed the action, and the co-plaintiffs before the declaration of war had given notice of appeal. The Court of Appeal refused to allow the appeal to proceed in the name of the co-plaintiffs, one of whom was an alien enemy.

The second of these cases is *Candilis & Sons* v. *Victor & Co.* (2), decided on October 23, 1916, and was very much relied upon by the appellant's counsel in argument at the Bar of your Lordships' House. The action was brought by a firm at Manchester consisting of three partners, one a British subject and two Turkish subjects, who had become alien enemies on the outbreak of war with Turkey on November 5, 1914. The action was brought after the outbreak of war for detention and conversion of goods, and for breach of contract made before the war. The defendant applied by summons in the District Registry for a dismissal or stay of the action on the ground

(1) 31 Times L. R. 225. (2) 33 Times L. R. 20.

that two of the plaintiffs were alien enemies. This was refused by the Registrar and by the judge on appeal. The Court of Appeal granted the stay on the ground that the two alien enemies could not sue, and that the action was on behalf of the three. In this case, as in *M'Connell* v. *Hector* (1), the majority of the firm consisted of alien enemies, and the action was being prosecuted by them. The considerations which led the majority of the Court of Appeal to their conclusion in the present case are not adverted to in *Candilis & Sons* v. *Victor & Co.* (2), as is pointed out by Sargant J. in the present case (Appendix, p. 121, letters B and C), and indeed it does not appear that they arose upon the facts of that case.

Upon the whole, my opinion is that the judgment of the Court of Appeal was right, and that this appeal should be dismissed with costs.

VISCOUNT HALDANE. My Lords, I think that the answer to the question raised by this appeal turns on a broad issue of principle. Is the rule which prevents an enemy alien from suing in the King's courts a crystallised proposition which forms part of the ordinary common law, and is so definite that it must be applied without reference to whether a particular case involves the real mischief to guard against which the rule was originally introduced ? Or is the rule one of what is called public policy, which does not apply to a particular instance if that instance discloses no mischief from the point of view of public policy ? Now there are many illustrations of both kinds of rule. Since, for example, this House in 1833 gave its decision in *Cadell* v. *Palmer* (3), it has been clear that private property cannot for any reason, however good, be rendered inalienable for private ends beyond a period of lives in being and twenty-one years afterwards. And yet at one time this period was not defined, and the motive which led to its prescription in a definite form was that restraint on alienation was considered to be required by public policy. That this was the genesis of the restriction is shown by the fact that it has not

(1) 3 B. & P. 113. (2) 33 Times L. R. 20.
(3) (1833) 1 Cl. & F. 372.

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been applied to charitable trusts where the public itself benefits by inalienability. Yet the rule has in other cases become a hard and fast one, to which no exception is tolerated to-day, for however excellent a reason. On the other hand, there are cases of a different kind, on which decisions have been given based merely on public policy accepted as matter of fact, and not on really legal principle, in a fashion which has always been made to depend on the particular circumstances of each case, and has rendered the question in reality one of fact for the Court, not the less that it was fact of which the Court would take judicial notice on its own initiative if necessary. Such were the cases on wagers in the days when they were enforced—cases in which, as was said by Parke B. in advising this House in *Egerton* v. *Earl Brownlow* (1): "Courts have been anxious to discountenance all wagers in which the parties have had no interest, and been astute, even to an extent bordering upon the ridiculous, to find reasons for refusing to enforce them." Thus a wager on the duration of the life of Napoleon was held void, because it might give the plaintiff an interest in keeping the King's enemy alive, and also on his death, because it might give the defendant an interest in compassing it by means other than lawful warfare: *Gilbert* v. *Sykes*. (2) Again, when a proprietor of carriages for hire in a town had made a bet that a particular person would go to the assembly rooms in his own carriage and not in another's, it was considered that the bet was void, as possibly tending to hamper the freedom of a member of the public in choosing his own conveyance, and to expose him to the inconvenience of being importuned by rival coachmen: *Eltham* v. *Kingsman*. (3) It was true that in such cases the judges were, as the Lord Chief Baron said in advising in *Egerton* v. *Earl Brownlow* (4), "no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it." Nevertheless,

(1) (1853) 4 H. L. C. 1, 124.
(2) (1812) 16 East, 150.
(3) (1818) 1 B. & Al. 683.
(4) 4 H. L. C. 151.

it happens that the question to be so decided is not one of law as distinguished from ethics, and therefore, in *Egerton* v. *Earl Brownlow* (1), the majority of the Law Lords, including notably Lord St. Leonards, laid down that limitations in a devise under which the estates settled were to go over if the possessor for the time being did not acquire a dukedom were bad, simply because of a mischievous tendency which might result in improper attempts to influence the discretion of the Sovereign as the fountain of honour. It was certainly the opinions of men of the world, as distinguished from opinions based on legal learning, which guided this House to its conclusion in that appeal. It may, in a qualified sense, be true, as Lord Halsbury observed in *Janson* v. *Driefontein Consolidated Mines* (2), that the Courts cannot invent new heads of public policy, and that when it is said that things are unlawful because they are contrary to public policy, it is meant that they have either been enacted or assumed to be unlawful by the common law, and not because a Court has any right to declare them to be so. But the observation must be taken with the qualification that what the law recognises as contrary to public policy turns out to vary greatly from time to time. Since, for example, Hull J., as quoted in *Egerton* v. *Earl Brownlow* (3), was moved to anger at a bond with a condition that if the grantor did not for six months exercise his craft as a dyer within the town where he carried on business the bond should be void, and is reported to have said, "Per Dieu, if he were here, to prison he should go," the law must have altered much in the interval if Lord Halsbury's statement is to be taken literally.

My Lords, I think that there are many things of which the judges are bound to take judicial notice which lie outside the law properly so called, and among those things are what is called public policy and the changes which take place in it. The law itself may become modified by this obligation of the judges. In *Nordenfeldt* v. *Maxim-Nordenfeldt Guns and Ammunition Co.* (4) the appellant had covenanted that

(1) 4 H. L. C. 151.
(2) [1902] A. C. 491.
(3) 4 H. L. C. 238.
(4) [1894] A. C. 535, 553.

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he would not for twenty-five years engage, except on behalf of the respondents, to whom he had sold his business, in the manufacture of guns or ammunition. It was held by this House that although the covenant was unrestricted as to space it was not wider than was required for the protection of the company, and was not injurious to the public interest. As Lord Herschell pointed out, in early times all agreements in restraint of trade, whether general or restricted to a particular area, used to be held bad. Later on there grew up a distinction between covenants in general restraint and those in which the restraint was only partial. That attempts at general restraint were at one time regarded, under all circumstances, as void, in accordance with a rule which had been recognised as part of the law, he thought was true. But means of communication had so changed that the reason for the distinction was gone, and the proper view seemed to be that what was once a settled principle was no longer applicable in altered conditions. Lord Watson agreed. "A series of decisions," he said, "based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. . . . . In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time." Lord Macnaghten put the same view in his own words, and cites the well-known judgment of Tindal C.J. in *Horner* v. *Graves* (1) as showing that the real foundation of the distinction between partial and general restraints is the desire to illustrate a rule which can only rest at last on what is a reasonable restraint with reference to the particular case. When the possibilities of communication became extended it was thus only a legitimate development—it was hardly even

(1) (1831) 7 Bing. 735.

an extension—of the principle on which exceptions were first allowed, to admit unlimited restraints into the class of allowable exceptions to the general rule.

My Lords, I think that the change in the view taken of the law as to covenants in restraint of trade, and the illustration it affords of the fashion in which decisions which were right in their time may cease to be of valid application, are highly instructive. For they show that between the class of cases in which, as in the instance of the rule against perpetuities, the law, although originally based on public policy, has become so crystallised that only a statute can alter it, and the different class, such as that of the cases relating to wagers, in which the principle of public policy has never crystallised into a definite or exhaustive set of propositions, there lies an intermediate class. Under this third category fall the instances in which public policy has partially precipitated itself into recognised rules which belong to law properly so called, but where these rules have remained subject to the moulding influence of the real reasons of public policy from which they proceeded. And I think that the decisive question before us is whether the doctrine of law which the Court of Appeal has dealt with in the present instance belongs to the first class or to the third. This is a point on which, in Lord Watson's language, the bare fact that decisions were given a long time ago cannot be conclusive. Before considering the question to which class the principle applied in the judgments before belongs I turn to the record to see what was actually decided in the case under appeal.

My Lords, the respondents prior to the outbreak of the war carried on business in partnership as bankers under the firm name of Speyer Brothers in the City of London, where they traded. Under the provisions of the deed, dated January 1, 1914, under which the partnership was constituted, it consisted of six members, of whom five were either British subjects or friendly aliens, and one, Eduard Beit von Speyer, was an enemy alien. One of the partners, who was a British subject, Sir Edgar Speyer, was by Clause 9 given power to decide all questions on which there might be any difference

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among the partners, and which might arise during its continuance or in the settlement of its affairs on dissolution or liquidation. On the outbreak of the war Eduard Beit von Speyer ipso facto ceased to be a member of the firm, and as a consequence it was dissolved, and its accounts were closed as at that date. The appellant is a foreigner resident in the Argentine Republic. The respondents on January 18, 1916, decided to bring an action against him, and a specially endorsed writ was issued in the King's Bench Division of the High Court of Justice. The claim was for 29,772*l.* 9*s.*, alleged to have become due under an agreement in writing made between the appellant and the respondents, and dated August 19, 1912. Leave to serve notice out of the jurisdiction was obtained, and such notice was served. The appellant did not appear within the time limited, and judgment in default of appearance was signed on July 17, 1916. Subsequently the respondents obtained a charging order on the appellant's interest in certain shares, and also an order giving leave to serve notice of application for a receiver of certain property belonging to the appellant. The appellant thereafter took out a summons asking that the judgment and the subsequent proceedings should be set aside, and that leave should be given to defend if necessary. The Master set aside the judgment and the subsequent orders on the ground that as one of the members of the respondents' firm was an alien enemy they could not maintain the action, and his decision was affirmed by Peterson J. I may observe in passing that it has not yet been ascertained whether, as the result of taking the partnership account, there will or will not be any balance due to the alien enemy partner. The Court of Appeal by a majority (Pickford L.J. dissenting) allowed an appeal, and rescinded the orders in question, remitting the applications in the action to the Master for rehearing on the merits.

My Lords, it will be observed that all that has been decided is that the action may proceed. Nothing has been settled as to what is to be done with the money if recovered, and it may still be directed to be paid into court or to the custodian. The question which goes to the root of the controversy is

whether, under these circumstances, the Court of Appeal was right in deciding even as much as this. It is said that unless the action is allowed to proceed the liquidation of the partnership affairs cannot be concluded, as a substantial asset cannot be got in, and that the interests of British subjects and others unquestionably entitled to sue will be prejudiced. It is also said that the action is really brought as a mere step in the liquidation, as much as if it had been brought by a receiver in the name of the partners and for the purpose of realisation out of the assets. As against this it is said that the action is no more than one by six joint contractors to recover a debt due to them jointly, and that, as the alien enemy being one of those was bound to be a party, the action is not maintainable.

My Lords, if the question were one of mere convenience and to be decided by the test of whether the allowance of the action would result in injury to the public interests, I should have little hesitation in saying that it ought to be allowed. The legislation which has established the office and duties of the custodian provides ample means for insuring that the enemy partner should not enrich himself during the war if any balance from the sum sought to be recovered were to be adjudged recoverable, and it is not desirable that money due from a defendant who is living abroad should be delayed in recovery. But whether the question is one of convenience is irrelevant if the case belongs to the first of the classes to which I have referred—that in which the principle is so definitely crystallised as part of the common law that it is inadmissible, notwithstanding that the original foundation of the principle may have been the convenience of the State, to go behind the rule to see whether the reason for it applies in a particular case. In order to determine how the law stands on the point it is necessary to examine the authorities; for if these lay down the principle consistently and clearly as one of mere law, it would not be legitimate to act on the footing that Lord Watson did in the *Maxim-Nordenfeldt* case in regard to covenants in restraint of trade when he said that decisions based on grounds of public policy have not the same binding authority as decisions which "formulate principles which are purely legal."

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We know that when it was said in Coke upon Littleton (129b) that an "alien enemy shall maintain neither real nor personal action," public policy had gone some way towards qualifying the harshness of the rule, although through the medium of a different tribunal. For in the time of Littleton it had already been laid down as to aliens who had come into England under the King's safe conduct that their proper court was that of Chancery, for there "they are not bound to sue according to the law of the land nor to abide the trial by twelve men and other solemnities of the law of the land, but shall sue in the Chancery, and the matter shall be determined by the law of nature" (see Pollock and Maitland's History of English Law, vol. 1, p. 465). As law and equity tended to approximate it is therefore not to be wondered at if the rule, which may well have originally been stringent in the common law tribunals with their local traditions, and which was said to deny to an alien enemy all rights to invoke the assistance of the King's courts, became less definite. Indeed, as early as the time of Queen Elizabeth in *Brocks* v. *Phillips* (1) the enemy administrator of one who was presumably a subject of the Crown was allowed to sue. No doubt it was not desired by the common law judges to drive him into Chancery. But the decisions of this period are certainly not consistent, for in an anonymous case (2) the attempt by an enemy alien executor to bring an action of debt was disallowed, and in another case reported at p. 45 of Owen's Reports (3) the result was the same. In the later text books, such as Bacon's Abridgement (tit. "Alien"), the question is treated with distinctness as one of public policy, and as admitting in certain cases of doubt. In Comyns' Digest, on the other hand (sub tit. "Abatement"), it is said that a plea in abatement to the effect that even one of two of the plaintiffs is an enemy alien is a good plea.

The later authorities undoubtedly in many instances tend to treat the rule as one which had become a rigid principle of

(1) Cro. Eliz. 683. (2) Cro. Eliz. 142.
(3) 31 Eliz.

the common law, but they do not all of them tend in this direction. *Daubigny* v. *Davallon* (1); the dictum of Sir William Scott (unnecessary, however, for the decision) in *The Hoop* (2); *M'Connell* v. *Hector* (3); and *Albrecht* v. *Sussmann* (4) are all adverse to the title to sue. So is the judgment of Lord Kenyon C.J. in *Brandon* v. *Nesbitt* (5), and I think also the judgment in *Le Bret* v. *Papillon.* (6) The former was an action on a marine policy by a British plaintiff, who, however, appeared on the record to have been an agent in effecting the policy for enemy aliens. It was strongly laid down that such an action would not lie, and having regard to things said in the course of the decisions I have just referred to it is not surprising that this should have been so.

On the other hand, in *Flindt* v. *Waters* (7), where a British agent had effected a policy of insurance on behalf of alien enemies who were not so at the time of the loss but had become so before action brought, Lord Ellenborough C.J. laid down the law more guardedly. "The defence," he said, "of alien enemy must be accommodated to the nature of the transaction out of which it arises: it may go to the contract itself on which the plaintiff sues, and operate as a perpetual bar; or the objection may, as in a case of this sort, be merely personal, in respect to the capacity of the party to sue upon it. Here the objection is taken upon the general issue, which is a plea of a perpetual bar, and if found against the plaintiff, would have excluded him for ever: so that though peace should be established to-morrow between the two countries, and the Crown should not have interfered to seize the debt, yet on this plea in bar the plaintiff would have been for ever estopped to sue for his debt. But here the objection is only of a temporary nature: the contract itself was perfect at the time it wa made: the trade was with an alien friend." As the cause of action had arisen before the assured became alien enemies, and was only temporarily suspended, the Court thought that

(1) 2 Anst. 462.
(2) 1 C. Rob. 196.
(3) 3 B. & P. 113.
(4) 2 V. & B. 323.
(5) 6 T. R. 23.
(6) 4 East, 502.
(7) 15 East, 260, 265.

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the supposed rule was not one which applied with such rigidity as to create a perpetual bar, and on the plea of the general issue it was therefore treated as not applying.

Ex parte Boussmaker (1) is a case in which an analogous view was taken by Lord Erskine L.C., for he allowed an enemy alien to invoke the assistance of Chancery by a petition to prove a debt under a commission of bankruptcy because the contract under which the debt arose had been entered into in time of peace, and the title to the debt would therefore become enforceable when peace came. The remedy was only suspended, and the dividend should therefore be reserved. In *Daubuz* v. *Morshead* (2), Gibbs C.J. held that the plaintiff, although trustee for an alien, was entitled to a judgment for money, but added that he could not say what the Crown might not do to lay hands on the money. On the other hand, Lord Campbell C.J. (*Alcinous* v. *Nigreu* (3), allowed a plea puis darrein continuance that the plaintiff had become an alien enemy. The right of action was held to be suspended during the war.

My Lords, while I think that the preponderance of authority down to this date has tended to this treatment of the rule as a rule of ordinary law and not as a mere case of applying policy, the Courts have been, as I have shown, by no means unanimous, and I do not think that the course of subsequent decision has materially affected this conclusion. The careful and elaborate judgment of Lord Reading C.J. in *Porter* v. *Freudenberg* (4) is in favour of the view that the rule is a rigid one. *Candilis & Sons* v. *Victor & Co.* (5) was decided in the same sense. On the other hand, in *Mercedes Daimler Motor Co.* v. *Maudslay Motor Co.* (6) and in *Rombach* v. *Gent* (7), Warrington J. and Lush J. respectively appear to have taken the other view.

My Lords, under these circumstances I am of opinion that it is open to us, as a supreme tribunal unfettered by any decision of its own, to look at the reason of the rule invoked. If we can do this I agree with the majority in the Court of

(1) 13 Ves. 71.
(2) 6 Taunt. 332.
(3) 4 E. & B. 217.
(4) [1915] 1 K. B. 857.
(5) 33 Times L. R. 20.
(6) 31 Times L. R. 178.
(7) 31 Times L. R. 492.

Appeal that it is premature to stop the action at this stage from proceeding. And I think that if this be so the balance of public convenience is in favour of allowing the respondent firm to get in this debt if on the merits they can. Should they succeed in doing so I am far from implying that any share of it should be paid out as part of the assets to be realised in taking the account to the enemy partner. But, so far as the decision of the Court of Appeal at present extends, it seems to me to have been right.

LORD ATKINSON. My Lords, the action out of which this appeal arises was brought by the firm of Speyer Brothers against the defendant to recover a sum of 29,772*l.* 9*s.*, money alleged to be due to the plaintiffs under a certain agreement as money lent.

It is therefore an ordinary common law action to recover money lent, and nothing else. Whether equivalent relief could be obtained in a different form of suit is in my view wholly irrelevant. The plaintiff's firm was not a persona according to English law. The name of the firm is only a short name for the members composing it. Those partners were Sir S. Edgar, a naturalised British subject; James Speyer, a German resident in New York; Eduard Beit von Speyer, a German resident in Frankfort-on-Main, and therefore an alien enemy; Henry Oppenheimer, described as of German origin; and two British subjects. These six persons are the plaintiffs in the action. It matters nothing that they are described shortly by the name of their firm. It is admitted the partnership has been dissolved by the outbreak of the present war.

It is no doubt true that a partnership after dissolution continues to exist merely for the purpose of completing pending transactions, winding up the business of the partnership, and adjusting the rights of the partners; and that for these purposes, and these only, the authority rights and obligation of the partners continue: *Beak* v. *Beak* (1); *Wood* v. *Braddick* (2); Partnership Act, 1890, s. 38.

(1) (1674) 3 Swan. 627. (2) (1808) 1 Taunt. 104.

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The relation between the partners after dissolution is not that of a debtor and creditor unless and until the accounts have been finally taken, and a balance has been ascertained to be due by each one to the others. Advances made by one partner to the partnership, as well as those received from it by another, are mere items in the accounts between them, and cannot be treated as debts due to it. *Richardson* v. *Bank of England.* (1) The alleged indebtedness of von Speyer, the alien enemy partner, to the partnership in the present case may therefore be put aside. His debt is merely an asset of the partnership. The partners who, after dissolution, sue for a debt due to the firm, and therefore forming part of its assets, cannot be treated as the beneficial owners of the debt. It may, if recovered, increase the share of assets ultimately divisible amongst them on taking the final account. Or it may decrease the amount they have to pay to the creditors of the firm should it prove insolvent. So that the right, by virtue of which the plaintiffs sue in this action to recover the sum sued for, is precisely the same in character and nature as that by virtue of which they could have sued to recover it had the partnership not been dissolved. The fact that the attempt to recover the money is a step in the winding up of the partnership business cannot alter the character in which they sue—namely, that of creditors to whom a debt is jointly due. Every authority, therefore, touching the right of a number of partners, one of whom is an alien enemy, to sue during the partnership for a debt to them jointly applies to the case. It is quite right that property claimed by an alien enemy to belong to him should not during the war be given over to others. This, and nothing more, was, in my view, all that was decided in *Ex parte Boussmaker.* (2)

It well may be that any sum ultimately found to be due to the alien enemy on the taking of the final account should be preserved for him till the war is over, and he ceases to be an alien enemy, but that is entirely beside the point. He is not now the beneficial owner of one shilling of the sum sued for, and no portion of it, if recovered, could be held in trust for him.

(1) (1838) 4 My. & Cr. 165. (2) 13 Ves. 71.

At law the partners are joint tenants of debts due to the partnership. In equity they are, as between themselves, treated as tenants in common of such debts. For the purposes of the winding up of the partnership affairs after dissolution each partner is the agent of the others, and thus each stands to the others in a fiduciary relation: *Cassels* v. *Stewart* (1); *Hugh Stevenson and Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie.* (2) But in *Knox* v. *Gye* (3) Lord Westbury lays it down distinctly that a surviving partner is not the trustee of a deceased partner nor of his representatives in the proper sense of that term. And in *Piddocke* v. *Burt* (4) Chitty J. decided that a partner who receives assets of a partnership on account of himself and his co-partners is not liable to be imprisoned under s. 4, sub-s. 3 of the Debtors Act of 1869 as a person acting in a fiduciary capacity within the meaning of that Statute. That decision has never been reversed or, as far as I am aware, disapproved of.

Moreover, so little is each partner in the position of a trustee for the firm, or for his co-partners, that one member of the partnership is not necessarily precluded from purchasing the share of another in the partnership without the knowledge of the rest of the partners, or from making, on his own account, a purchase not within the scope of, or in rivalry with, or injurious to the partnership: *Cassels* v. *Stewart* (5); *Trimble* v. *Goldberg.* (6)

In my view, therefore, the plaintiffs in this common law action cannot be treated as suing as trustees in any proper sense of that word either for the dissolved partnership or for its members or any of them. Neither does their position in any way resemble that of the executors or administrators of a deceased person, who, by the grant of probate or letters of administration by the proper Courts, are created representatives of that person, clothed with authority to assert in courts of law not their own rights, but the rights which would have belonged to the deceased person if alive. The plaintiffs are not

(1) (1881) 6 App. Cas. 64, 77.
(2) [1918] A. C. 239.
(3) (1872) L. R. 5 H. L. 656, 675.
(4) [1894] 1 Ch. 343.
(5) 6 App. Cas. 64.
(6) [1906] A. C. 494.

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in this action suing en autre droit. They do not even pretend to do so.

The rule of law, now, I think, firmly established by decisions extending over more than three centuries, made by some of the ablest and most distinguished judges that ever sat upon the English Bench, is this—that an alien enemy, while he remains so, is personally disqualified from seeking the aid of the Courts of the Sovereign of this country, with whom the Sovereign power to which he himself owes allegiance is at war, to enforce his own civil rights. Alienage alone formerly disqualified a person from bringing real or mixed actions in English courts, but the vital fact which disqualifies the alien enemy from seeking from the Courts relief in his own right in any form of action is, not his alienage, but the hostility in war between the English Sovereign and his own.

This rule of our law, like many others of our rules of law, was, no doubt, originally based upon, and embodied, certain views of public policy ; but in this case, as in many others, the principles of public policy so adopted have, as numerous authorities conclusively show, crystallised, as it were, into strict and rigid rules of law to be applied, to use Lord Stowell's words, " with rigour." If that be so, as I think it clearly is, then the cases establish that it is wholly illegitimate for any judicial tribunal, which may disapprove of the principles of public policy so embodied in the rigid rule, to disregard that rule in any particular case, and base its decision on other principles of public policy of which it more approves. To do so would be to usurp the prerogative and powers of the Legislature, since it is the function of the Legislature, not of judicial tribunals, to discard the principles embodied in such rules, and in its enactments embody others which it prefers. For instance, the well-established rule of law which throws the protection of an absolute privilege around the observations of a judge while presiding in a court of justice, of an advocate while speaking there on behalf of his client, of a witness while giving his evidence there, or of a member of either House of Parliament while speaking in the House to which he belongs, is also based upon a principle of public policy—namely, this, that it is more for the public

good that private individuals should be made to suffer in pocket or repute by the observations of the individuals I have named than that these latter should, by the fear of hostile litigation, be deterred from speaking their mind freely when discharging their respective duties. And yet an innocent and deserving citizen, who, owing to the erroneous view of his conduct taken by a judge at a trial, may be most cruelly defamed, have attributed to him fraud, falsehood or perjury, and yet, owing to this absolute privilege of the judge, be left without a remedy, is surely as worthy an object of sympathy and commiseration as an alien enemy, or as a merchant who, by taking into partnership an alien who he must know may subsequently become an alien enemy, finds himself embarrassed in winding up the affairs of the partnership after it has been dissolved. But if a citizen so wronged should sue his judicial detractor for libel or slander, and the case were permitted to go to trial, and the presiding judge, disapproving of the principle of public policy embodied in this rule, were to hold that the defendant's privilege was only qualified or did not exist at all, his conduct would be rightly denounced as an outrage. And yet, if the strict rule of the law must be applied in this case—whatever the presiding judge's view of public policy may be—it is difficult to see upon what principle the strict rule of law is not to be applied in the other.

My Lords, I regard this question of the illegitimacy of a judicial tribunal acting, in any particular case, on its own views of public policy, as distinguished from the established rule of laws based upon public policy, as so important that I may be excused from quoting the well-known passage from the judgment of Parke B. in *Egerton* v. *Earl Brownlow*. (1) It runs thus: "To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law

(1) 4 H. L. C. 123.

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from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have, no doubt, been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise."

That statement of the law was quoted with approval and enforced by Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines* (1), and by Lord Reading when delivering the judgment of the Court of Appeal in *Continental Tyre and Rubber Co.* v. *Daimler Co.* (2)

If I am right in the view I hold that the authorities establish that an alien enemy is personally disqualified from suing in any action in any of our courts of law, with the doubtful exception of cases where he sues as executor or administrator, then I think it can scarcely be contested that this appeal should succeed, unless indeed a special exception be made in favour of the alien enemy and his associates in this particular case. My view has, however, been stoutly contested by the respondents' counsel, and it has been argued that the enemy alien's disqualification depends on the possible result of the litigation which he institutes and in which he is the actor. He is disqualified, it is contended, from suing only in those actions by which, if successful, he would be enriched. I need scarcely say that not a shred of authority was quoted in support of that proposition, while it is refuted by many of the cases decided during the last century and a half. As, however, the foundation and binding force of the rule has been challenged it is necessary to examine in detail some of these latter authorities.

The rule of law itself and the grounds upon which it

(1) [1902] A. C. 484, 491, 496. (2) [1915] 1 K. B. 893, 912, 918.

rests are, I think, as shortly, clearly and accurately stated by Buckley L.J. in the *Continental Tyre and Rubber Co.* v. *Daimler Co.* (1) as they can well be. He said: "The proposition that an alien enemy cannot sue rests, I conceive, upon the proposition that such an one cannot approach the King, has no resort to the King, and cannot invoke the assistance of the King. The Court is the King's Court. The alien enemy cannot come into that Court or have the assistance of that Court because the Court is for judicial purposes the King sitting in his Court and the alien enemy cannot approach him." That statement of the law was not dissented from by any of the members of the Court of Appeal. The meaning of this passage clearly is that the disqualification of the alien enemy is a personal disqualification depending upon his personal status as the subject of a state at war with the King of England, and not at all upon the nature and character of the civil right he desires to enforce, whether it be legal or equitable, joint or several, nor upon the result of the suit. The numerous authorities cited in argument in my opinion clearly support this view.

I begin with *Sylvester's case.* (2) There a French refugee brought an action. The report does not state for what. It was pleaded in abatement that he was an alien enemy born under allegiance of the French king, then at war with Queen Anne. To this there was a demurrer. The plea was held good; and it was laid down that "if an alien enemy comes into England without the Queen's protection, he shall be seized and imprisoned by the law of England, and he shall have no advantage of the law of England, nor for any wrong done to him here; but if he has a general or special protection, it ought to come of his side in pleading." So immaterial to this decision was the cause of action in the estimation of the reporter that it is not even mentioned, as it would naturally have been if the disqualification depended upon it. To the same effect is Case 8 in 1 Dyer, 2b. In *Sparenburgh* v. *Bannatyne* (3) the action was framed in assumpsit for wages due to the plaintiff as a seaman. A plea was pleaded that the plaintiff was an alien enemy

(1) [1915] 1 K. B. 918. (2) (1703) 7 Mod. 150.
(3) (1797) 1 B. & P. 163, 170.

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of the English King adhering to the King's enemies. Eyre C.J., on delivering judgment upon a motion for a new trial, is reported to have said: "As to the ground of policy which has been taken in argument for the defendant, namely, that a benefit would result to the enemy from the plaintiff's recovering; it is a policy, perhaps doubtful, certainly remote, and which I do not hold to be satisfactory. I take the true ground upon which the plea of alien enemy has been allowed is, that a man, professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our own subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and the jurisdiction of our courts. Such is the case of an outlaw."

In this judgment the disqualification is clearly based on personal grounds, namely, the hostility of the suitor to the Sovereign in whose courts he sues, not on the nature of the claim he makes, nor on the result of the suit if successful in enriching him or benefiting his country. In *Daubigny* v. *Davallon* (1) goods were alleged to have been received by the defendants as agents for the plaintiffs, and a bill of discovery was filed for the discovery of the goods so received, stating that discovery was necessary for the purpose of supporting an action intended to be brought to recover the value of the goods. A plea was filed to the effect that the plaintiffs were alien enemies. Macdonald C.B., in delivering judgment, said: "It has been insisted that the plea of alien enemy applies only to those suits in which relief is sought, and not to mere bills of discovery. However the law may originally have stood, it is now settled that alien friends have a right to institute suits in the King's courts for the recovery of their rights; they come into this country either, as was formerly the case, with a letter of safe-conduct, or under a tacit permission which presumes that authority. So, if they continue to reside here after a war breaks out between the two countries, they remain under the benefit of that

(1) 2 Anst. 462, 467.

protection, and are impliedly temporary subjects of this kingdom. But if the right of suing for redress of the injuries they receive were not allowed them, the protection afforded them would be incomplete, and merely nominal. This claim to the protection of our courts does not apply to those aliens who adhere to the King's enemies. They seem upon every principle to be incapacitated from suing either at law or in equity. A doubt had at first arisen, whether suits for discovery were not in their nature an exception to this rule ; but we are now satisfied that no real distinction exists. The disability to sue is personal ; it takes away from the King's enemies the benefit of his courts, whether for the purpose of immediate relief, or to give assistance in obtaining that relief elsewhere." Here not only is it expressly declared that the disability to sue is personal, but this fact is made the very basis of the judgment. This is quite inconsistent with the respondents' contention that the rule only applies to cases in which, if successful, the plaintiff would be enriched. Where an alien enemy is sued natural justice demands that he should be permitted to defend himself, and it is probable he would be permitted to file a bill solely for discovery in aid of his defence. The case of *Brandon* v. *Nesbitt* (1) decides in the main this, that alien enemies will not be permitted to do indirectly what they are disqualified from doing directly.

There an agent had in his own name effected for his principals a policy of insurance on certain goods, belonging to them, shipped on board a ship named the *Greyhound* to be carried from London to Bayonne. The goods were captured by the French, then at war with England. Several of the agent's principals, the owners of the goods, were alien enemies. The declaration, the agent being the plaintiff, contained an averment that the policy was effected for the benefit of and on the account of those principals, naming them. A plea was filed by the defendant company to the effect that the owners were alien enemies of the King of England. To this plea a replication was filed to the effect

(1) 6 T. R. 23.

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that the owners of the goods were indebted to the plaintiff in sums exceeding the amount sued for on the policy. This replication was demurred to, and the plea was thereby left open to attack. The argument in support of the plea was this, that the action was to all intents and purposes the action of the alien enemies. The plea was held good, and judgment was given for the defendant on the ground, as stated by Lord Kenyon C.J., that "an action will not lie either by or in favour of an alien enemy." He then points out that the ultimate decision of the Exchequer Chamber in *Anthon* v. *Fisher* (1) proceeded on the same ground, and that they had not found a single case in which an action had been supported in favour of an alien enemy. For though it was held in *Ricord* v. *Bettenham* (2) that an action by an enemy on a ransom bill might be maintained, the action was not brought till peace had been restored, which got rid of the objection. Lord Kenyon appears to be perfectly right in this latter statement, as from the report in 3 Burr. 1734 it appears that the capture of the vessel took place on August 24, 1762, that the ransom bond was given on the same day, that peace was restored on November 3, 1762, and that the trial did not take place before Lord Mansfield at the Guildhall till the Easter sittings of 1765. The second point taken in argument was not that an alien enemy could sue, but that, as the contract was made during the war, and the breach of it occurred during the war, the question was whether such a contract could be enforced even in peace time. It was held it could, as it turned upon the necessity of the case, otherwise the vanquished might be killed by the victor. It will be observed that Lord Kenyon in his judgment says not a word about the replication being a departure. That point, so far from being made the basis of the judgments, as contended for by the respondents' counsel in the present case, was entirely ignored. In the case of *The Hoop* (3), Lord Stowell says: "In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of

(1) Doug. 649 *n.* [† 132].
(2) (1765) 3 Burr. 1734; 1 Wm. Bl. 563.
(3) 1 C. Rob. 196, 200.

civilians a persona standi in judicio. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that pro hac vice discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace pro hac vice. But otherwise he is totally exlex; even in the case of ransoms which were contracts, but contracts arising ex jure belli, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom." If that passage does not amount to a declaration that the alien enemy is personally disqualified from suing I do not know the meaning of language.

In *M'Connell* v. *Hector* (1) it was laid down by Lord Alvanley, and by the Court decided, that two members of a firm of three who, though British subjects, resided in France, then at war with England, and carried on trade there, were to be treated for all civil purposes as being as much alien enemies as if they were born there, and that because of this a commission of bankruptcy founded on the petition of the member of the firm resident in England for a debt due to himself and his partners could not be supported. This case shows that one member of a partnership cannot sue in bankruptcy in his own name to recover the joint debt. The owners of the joint debt must all sue, and if two of them be in the position of alien enemies the suit must fail. The fact that they were partners affords no help. The decision in this case was approved of, and in effect followed, by Lord Ellenborough in the case of *Roberts* v. *Hardy*. (2) In the latter case a debt was due to two partners, one of whom was resident in France. It was held to be good to support a

(1) 3 B. & P. 113. (2) (1815) 3 M. & S. 533, 536.

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commission of bankruptcy issued on the petition of the two partners because this residence was not shown, as it was in the case before Lord Alvanley, to amount to an adhering to the King's enemies. Lord Ellenborough, in giving judgment, said: "It is too much therefore to attach upon his remaining there" (i.e., the partner's remaining in France), "and not getting away from the country upon its becoming hostile, those disabilities which belong to a person who adheres to the King's enemies. I reserved the point on the authority of *M'Connell* v. *Hector* (1), and in deference to the judgment of the Court of Common Pleas, and of Lord Alvanley in particular; but there it is observable was a trading, and Lord Alvanley states both a residence and trading. If that fact was so here we might draw the conclusion." Le Blanc and Bayley JJ. concurred.

It is plain that if, in this latter case, the absent partner had been clearly shown to be an alien enemy the Court would have held, as Lord Alvanley had held, that the commission in bankruptcy could not be supported. My Lords, it appears to me to be impossible to distinguish on any rational principle the present case from these two cases. In them partners, apparently while the partnership existed, sought to recover a debt due to the partnership, or a dividend upon it through the medium of the Court of Bankruptcy. In the present case the former partners seek to recover a debt due to the partnership through the medium of a court of common law. Surely the difference in the tribunal in which relief is sought cannot affect the alien enemy's personal disability to sue. Neither can the fact that the partnership has, in the present case, been dissolved, since the plaintiffs, as I have shown, now sue in the same character, and by virtue of the same right as they would have sued in and by virtue of if there had not been any dissolution. In *O'Mealey* v. *Wilson* (2) the plaintiff filed a bill of scire facias against the defendants as bailsmen for one Newell. Three pleas in abatement were filed setting out in different forms facts showing the plaintiff was an alien enemy. Lord Ellenborough again laid it down that if the

(1) 3 B. & P. 113. (2) (1808) 1 Camp. 482.

plaintiff, an Irishman by birth, voluntarily resided and carried on trade in France, the defendants would be entitled to a verdict on each of these three pleas. In *Le Bret* v. *Papillon* (1) the plaintiff sued on assumpsit on a foreign judgment. At the time of action brought he was not an alien enemy, but became so before a plea in bar had been pleaded. It was held by Lord Ellenborough that this plea was bad, as it should have been a plea in abatement and not in bar, but that the Court was bound to give judgment on the whole record; and it appearing that the plaintiff had become an alien enemy and therefore incapable of further maintaining his suit, it was adjudged that he should be barred from further maintaining it. This case is, in my view, undistinguishable in principle from the present, and it is quite clear that in it the plaintiff's inability to sue was based upon a personal disqualification—namely, his status as an alien enemy and not on the nature of the relief sought. Lord Lindley, in delivering judgment in *Janson* v. *Driefontein Consolidated Mines* (2), refers to this case in the following sentence: "Of course, if war breaks out before the action is brought or before it is over, the war suspends its prosecution, for an alien enemy cannot sue in this country: *Le Bret* v. *Papillon*. (1)" That able, distinguished and accurate judge apparently knew nothing of the novel qualifications now insisted upon touching an alien enemy's disability to sue. If the respondents are right he should have said: "for an alien enemy cannot sue in this country unless the suit, if successful, would not enrich him, or unless he be party to a suit brought by his former co-partners in a partnership dissolved by the war, as a step in the winding up of its affairs, or unless the suit is brought substantially for the benefit of his former co-partners, not for his own benefit." No mention is made by Lord Lindley of such things as these. In *Albrecht* v. *Sussmann* (3), in an action brought by two partners against a third for an account, payment and an injunction, it was held by Sir Thomas Plumer V.-C. and by Lord Eldon on appeal that a plea in abatement

(1) 4 East, 502. (2) [1902] A. C. 510.
(3) 2 V. & B. 323.

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that the plaintiffs were alien enemies was good. Sir Samuel Romilly in argument stated that the law was clearly settled by numerous cases that an alien enemy, not resident here by the permission of the Government, is under a personal disability to institute a suit either at law or in equity, and cites in support of that proposition the authorities I have already cited.

In *Flindt* v. *Waters* (1) the plaintiff, an agent who had effected a policy of insurance on behalf of persons who became alien enemies after the contract had been made and the loss happened, but before the bringing of the action, was held entitled to recover against an underwriter who only pleaded the general issue, on the ground that this contract was legal at the time it was made, and liable to be enforced upon the return of peace, and that the temporary suspension of the assured's right to sue could not be taken advantage of under a plea of a perpetual bar, there being no legal disability on the plaintiff on the record to sue. In giving judgment, Lord Ellenborough C.J. said : " The ground of our decision in this case will not at all clash with the doctrine laid down by the Court in *Brandon* v. *Nesbitt*. (2) The point there decided was that the fact of the parties interested in the insurance having become alien enemies before the loss happened might be pleaded to an action brought in the name of a British agent who effected the insurance : and the Court are disposed to confirm that doctrine. But the defence of alien enemy must be accommodated to the nature of the transaction out of which it arises ; it may go to the contract itself on which the plaintiff sues, and operate as a perpetual bar ; or the objection may, as in a case of this sort, be merely personal, in respect to the capacity of the party to sue upon it."

In *Alcinous* v. *Nigreu* (3) an action was brought for work and labour done. A plea was filed which was held to be in substance that the plaintiff was an alien enemy. Lord Campbell, in delivering judgment, said : " The contract having been entered into before the commencement of

(1) 15 East, 260, 265. (2) 6 T. R 23.
(3) 4 E. & B. 217, 219.

hostilities, is valid ; and, when peace is restored, the plaintiff may enforce it in our courts. But, by the law of England, so long as hostilities prevail he cannot sue here." In *De Wahl* v. *Braune* (1) the plaintiff, living in England, and separated from her husband, sued alone to recover the price of a leasehold interest which she had sold. A plea in abatement was filed to the effect that she was married and her husband was still living. To this plea a replication was filed to the effect that the plaintiff's husband was not, at the commencement of the suit, present in or resident in this country; that he was an alien enemy, whilst she, the plaintiff, was a subject of the Queen residing in England as a single woman. This replication was demurred to. The case was decided by Pollock C.B., Martin and Bramwell BB. Martin B. said : "In either view the replication is bad. Assuming the contract to have been made after marriage, it was the husband's contract, and he might have sued alone upon it. I doubt whether the principle of the wife being allowed to join, where she is the meritorious cause of action, applies to a case like this ; but at all events she cannot sue alone. Then, assuming the contract to have been made before marriage, the effect of the marriage is to vest the right of action in the husband, so that the necessity of his being joined arises from the interest being in him. There is no authority for saying that an alien enemy is civiliter mortuus ; he is alive, but under a disability." In *Porter* v. *Freudenberg* (2), Lord Reading delivered the judgment of the Court of Appeal, consisting, in addition to himself, of Lord Cozens-Hardy M.R., Buckley, Kennedy, Swinfen Eady, Phillimore and Pickford L.JJ. He reviewed all the authorities I have cited and some others, and came to the following conclusions amongst others : (1.) That an alien enemy, unless he be within the realm by licence of the King, cannot sue in the King's courts; (2.) that he may be sued in those courts ; (3.) that when sued he has a right to enter an appearance and defend the action; (4.) that he has also the right to appeal against any decision, final or interlocutory, that may be given against him, but that an alien enemy who is

(1) (1856) 1 H. & N. 178, 182. (2) [1915] 1 K. B. 857, 873, 874.

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plaintiff in an action commenced before the outbreak of war has no present right of appeal. His right of appeal is suspended until the conclusion of peace. He deals with the case of *Ex parte Boussmaker* (1), and says that it is not for the reasons he gives to be regarded as an authority for the proposition that an alien enemy can present a petition to the Court and be heard upon it. *Halsey* v. *Lowenfeld* (2) is to the same effect.

I have cited all these cases to prove to demonstration, as I think they do, two propositions. First, that an alien enemy's inability to sue as plaintiff in any of the King's courts is due, not to the nature of the suit nor to his interest in its subject-matter, but to his status as an enemy to the Sovereign whose courts these are; and second, that from the earliest times down to the present there is not a suggestion in any of the leading cases decided by the most distinguished judges that such an enemy, unprotected by a licence from the Crown in some form, can sue in any form of action in any of the King's courts save where he sues as executor or administrator of some deceased person. The authorities dealing with this latter class of cases are conflicting. In my own view, those against the right to sue are more convincing than those in favour of it; but, however that may be, the exception proves the rule. It does not, as has, in effect, been contended, destroy the rule. And I am quite unable to appreciate a line of reasoning to the effect, that because an alien enemy can sue in the limited class of cases where he sues as representative of a deceased person, therefore he can sue equally well where he represents some living person or sues merely in his own right. Whether an alien enemy, therefore, can or cannot sue as executor or administrator is, in my view, in the present case entirely irrelevant. It does not touch the point in controversy.

The case of *Shepeler* v. *Durant* (3), which turns on an undertaking given by a defendant to plead to the merits of the action, not in abatement, conflicts in no way with any

(1) 13 Ves. 71.
(2) [1916] 2 K. B. 707.
(3) 14 C. B. 582.

of the cases cited. And while the objection is not now taken by plea on abatement but by summons to stay proceedings, the change of practice cannot alter the principle on which the Court acts. The cases of *Candilis & Sons* v. *Victor & Co.* (1), *Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* (2), cited by Pickford L.J., are entirely consistent with *Porter* v. *Freudenberg.* (3) In *Actien-gesellschaft für Anilin-Fabrikation and Mersey Chemical Works* v. *Levinstein* (4) (a case undistinguishable from the present) two persons appealed, one an alien enemy, and the other a British subject. It was held that that enemy alien was not entitled to sue as plaintiff either in a court of first instance or in a court of appeal. And it was further held that where the facts were not in dispute, and it was clear that some of the plaintiffs were alien enemies, the action ought not to be allowed to proceed.

I proceed to deal with some of the contentions put forward on behalf of the respondents in addition to those I have already mentioned.

The first of these is that if they had, under Order XVI., rule 11, of the Rules of the Supreme Court of 1883, made von Speyer, the alien enemy, a defendant, all difficulty would have been avoided, and they would have been entitled to hold their judgment. I entirely dispute that. It was laid down as long ago as *Cabell* v. *Vaughan* (5), and many times decided since, that it is necessary that all the persons with whom a contract is made should join in an action at law to enforce it, and that if any one of these should be dead that fact should be stated. The fact that the plaintiffs were partners cannot, and on all authority does not, alter the rule of law. Lords Cairns and Blackburn have, in *Kendal* v. *Hamilton* (6), laid it down that rule 11 of Order XVI. has not altered the legal principles with regard to the parties to actions, and further, that the Court, in the exercise of the discretion the rule confers upon it, should be guided by the same principles as were formerly applicable to a

(1) 33 Times L. R. 20.
(2) [1916] 1 K. B. 763.
(3) [1915] 1 K. B. 857.
(4) 31 Times L. R. 225.
(5) (1669) 1 Wms. Saund. (1845 ed.) 291 *n.*
(6) (1879) 4 App. Cas. 504, 516, 544.

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plea in abatement. These principles are illustrated by the case of *Jell* v. *Douglas* (1), which was an action of assumpsit for goods sold and delivered brought by the survivor of two partners, who were the original vendors of the goods. On proof of this latter fact it was held the action failed. A proceeding such as was taken in *Cullen* v. *Knowles* (2), is really a proceeding to make a person a plaintiff against his will. The relief he gets is just the relief a willing plaintiff would be entitled to, for judgment is entered for him together with the actual plaintiffs. No claim is made against him. He is not a defendant in any true sense of the term, and certainly not a defendant who has to defend himself against hostile claims within the meaning of *Porter* v. *Freudenberg*. (3) The suggested device would not, therefore, get over the difficulty. The alien enemy would still be in reality engaged in asking the aid of the King's courts to enforce his civil rights, which is the very thing forbidden.

The next contention put forward was that, acting under the Emergency Legislation of 1914 and 1916, the custodian might have been made a plaintiff to represent, I presume, the alien enemy. I am not quite sure that the rule of law which disqualifies the enemy alien from suing could thus be evaded; but even if it could be, it is a sufficient answer to say that this has not been done, and that judgment has been actually entered up. What has been done, not what could have been done, but has not been done, is the thing which matters.

The third contention I had some difficulty in understanding, and I am not quite certain I have correctly apprehended it. Mr. Romer again and again urged that in substance this was an action by the five former partners of the firm other than von Speyer, the alien enemy. This contention is, I presume, founded on the fact that as between the partners themselves he is only beneficially entitled to a small proportion of the capital and profits of the partnership. It amounts to this, that where a promise is made to several persons jointly who are thus collectively entitled to the performance of it, any one of them may be treated as if he were dead or non-existent if

(1) (1821) 4 B. & Al. 374. (2) [1898] 2 Q. B. 380.
(3) [1915] 1 K. B. 857.

he should not have a substantial interest in the sum or thing sought to be recovered, and the promisees who are substantially interested should be permitted to enforce by suit a promise never made to them alone. It is scarcely necessary to say that no authority was cited in support of this contention. It is opposed to all principles. The authorities, such as *Jell* v. *Douglas* (1), already cited, establishing the precisely contrary proposition, are conveniently collected at vol. 7, p. 337 *n.*, of The Laws of England, edited by Lord Halsbury.

It was finally contended that this House, disregarding what was said by Parke B. in *Egerton* v. *Earl Brownlow* (2), and by Lords Halsbury and Reading in the cases already cited, had in *Nordenfeldt* v. *Maxim-Nordenfeldt Guns and Ammunition Co.* (3) discarded the principles of public policy embodied in the old rules of law dealing with restraint of trade, and had adopted and applied new and different views of public policy, which to it seem more conducive to the public good. And your Lordships were, as I understood, invited to follow a similar course in reference to the rule imposing disability upon alien enemies to sue as plaintiffs in our courts of law, to adopt and apply to this subject some new and more cosmopolitan views of public policy, and to lay it down that, at least for all the purposes of suits such as the present touching partnership affairs, if not indeed for the purposes of all suits which alien enemies might desire to institute, they should be put practically in the position of British citizens. My Lords, even if this House had taken in the *Nordenfeldt* case the course mentioned, which I shall presently show is the very reverse of the course they actually took, I should earnestly hope your Lordships would not respond to this invitation, because the removal of the well-established personal disability of enemy aliens to sue must free the mind of every friendly alien wishing to embark in trade in any part of the King's dominions of every apprehension, that, should he become an enemy alien, he will experience any embarrassment in winding up his affairs. The absence of all anxiety upon that head would naturally

(1) (1821) 4 B. & Al. 374. (2) 4 H. L. C. 1.
(3) [1894] A. C. 535, 565.

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make him all the more willing to enter into partnerships in this country with English partners, and would naturally make the English partners also all the more ready to receive him as a partner. And thus that system of the peaceful penetration by aliens into our commercial and industrial and financial enterprises, now recognised as a grave and serious danger to the State, would be encouraged and promoted. In the *Nordenfeldt* case Lord Macnaghten reviewed all the authorities from *Mitchel* v. *Reynolds* (1) downwards, relying much upon the judgments of Tindal C.J. in *Horner* v. *Graves* (2) and *Hitchcock* v. *Coker* (3), in the former of which the Chief Justice, referring to the statement of Parker C.J. in *Mitchel* v. *Reynolds* (1) to the effect that a restraint against carrying on trade throughout the Kingdom must be void, but a restraint from carrying it on within a particular district is good, said: These "are rather instances and examples, than limits of the application of the rule, which can only be at last what is a reasonable restraint with reference to the particular case."

Lord Macnaghten then, in the frequently cited passage of his judgment (4), states what he considers to be the principle established by the authorities he had exhaustively analysed. The passage runs thus: "The true view at the present time I think is this: the public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it

(1) (1711) 1 P. Wms. 181.
(2) 7 Bing. 735, 743.
(3) (1837) 6 Ad. & E. 438.
(4) [1894] A. C. 565, 574.

is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of the authorities." Lord Macnaghten proceeded to say: "My Lords, for the reasons I have given, I think the only true test in all cases, whether of partial or general restraint, is the test proposed by Tindal C.J.: What is a reasonable restraint with reference to the particular case? I think that the restraint in the present case is reasonable in every point of view." Lord Herschell said (1): "When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees." And Lord Ashbourne (2) said: "Having regard to the facts of the present case, to the nature of the business, to the class and number of customers, I think the covenant reasonable and no larger than the protection of the respondents required." So far, then, is this case from being an example of the rejection by this House of old principles and the adoption and application of new principles, that it is a conspicuous example of the adherence to, and application of, the principles established by old authorities to the new and peculiar facts of the particular case. There is not a syllable in any of the judgments delivered to suggest that their Lordships were applying any new rule or principle of public policy to these new facts. The facts alone are treated as new, not the principles.

The case of *Tingley* v. *Müller* (3) has not, in my mind, any application whatever to the present case. On the whole, I am clearly of opinion that the judgment of Pickford L.J., consistent as, in my view, it is with the decisions of Eyre C.J., Macdonald C.B., Lord Stowell, Lord Kenyon, Lord Alvanley, Lord Ellenborough, Lord Eldon, Sir T. Plumer, V.-C., Pollock C.B., Lord Campbell, and Martin and Bramwell BB. in the cases I have cited, as well as with the most modern authorities, is clearly right in omnibus, and that the decision of Bankes L.J. and Sargant J., in effect in conflict, as I think it clearly is, with all these decisions, is erroneous, and should be reversed, and this appeal be allowed with costs.

(1) [1894] A. C. 550. (2) Ibid. 559.
(3) [1917] 2 Ch. 144.

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LORD SUMNER. My Lords, this action cannot be maintained unless Herr Eduard Beit von Speyer, of 62 Forsthaus Strasse, Frankfort-on-Main, a German subject, is a party to it. That he is an enemy not sub protectione domini regis was brought to the notice of the Court. In whatever capacity he is a party, the action, if it results in a judgment against Mr. Manuel Antonio Rodriguez of Argentina, will enure presently, if indirectly, to his material benefit. The decision appealed against involves the proposition that an alien enemy, resident in Germany and not enjoying the King's licence or protection, can nevertheless flagrante bello enter the King's court as an actor, and seek a judgment to his own advantage, provided he does so jointly with others, who are under no incapacity.

The action is brought on a joint contract to recover a joint debt. The plaintiffs sue as Speyer Brothers, but for the purposes of this action and as against the defendant they are joint contractors. Whether the action is "in substance" an English action or an enemy action, it is defective and unsustainable, unless all are parties. This is a rule of English law, at least as technical, at least as inconvenient to the other partners, and at least as much based upon public policy as that in question, but no one has attempted to dispute it. From some observations of Sargant J. (Appdx. p. 120) it would seem that he relied on the view that the objection of alien enemy must be taken by plea, though this, in any case, overlooked the fact that two of the summonses were connected with the enforcement of a judgment in favour of the enemy plaintiff with others. I think this view has not commended itself to your Lordships, but it had better be dealt with.

My Lords, how can the Court shut its eyes to the presence of an enemy before it? If it be indeed the rule that no enemy shall have his action in the King's courts, and a fortiori, if the rule rests on public policy, the Courts may admit him or eject him, but on principle they must do one thing or the other. They cannot ignore him. Nor can the point be left to the defendant to take or waive as he pleases, for it is a rule of the forum, not dissimilar to a limit upon its jurisdiction. Decisions

have, of course, always turned to a large extent on the practice of the time, but in *Le Bret* v. *Papillon* (1), a case of assumpsit on a French judgment, where the objection of enemy character was wrongly pleaded in bar and not in abatement, the Court held that notice must be taken of the plaintiff's incapacity, although it was not properly pleaded. Lord Ellenborough applied the language of Montague C.J. in *Dive* v. *Maningham* (2) that "we by our office ought to give judgment against the plaintiff; for altho' the defendant may not take the advantage, yet inasmuch as it appears to us that the plaintiff has no cause of action, we ought to give judgment against him." *Vanbrynen* v. *Wilson* (3) is merely a case in which the Court, after verdict for the plaintiff, refused summarily to stay judgment and execution on the ground of the plaintiff's being an enemy, but left the defendant to move formally. Whether this was done we do not know. *Shombeck* v. *De la Cour* (4) and *Thyatt* v. *Young* (5) decided that alien enemy might not be pleaded along with inconsistent pleas, such as tender or non assumpsit, which assume the plaintiff's locus standi in court. It does not appear that the Court proceeded to give judgment in favour of a plaintiff known to be an alien enemy. In *M'Connell* v. *Hector* (6), as in *Roberts* v. *Hardy* (7), the case was trespass to try the validity of a commission in bankruptcy issued by a defendant resident here in respect of a debt due to himself and his enemy partners jointly. Accordingly it was not material to consider under what form effect should be given to the enemy's incompetence; and it was held in the former that the defendant could not sue for the debt by himself, and could not join his co-contractors, who were resident among and adherent to the King's enemies. *Shepeler* v. *Durant* (8) was relied on in the Court below. The ground on which it proceeded was that the defendant sought an indulgence contrary to good faith and to an undertaking given to the Court. Probably it followed, though the case was not cited, *Simeon* v. *Thompson*. (9)

(1) 4 East, 502, 509.
(2) (1550) 1 Plowd. 66.
(3) (1808) 9 East, 321.
(4) (1808) 10 East, 326.
(5) (1800) 2 B. & P. 72.
(6) 3 B. & P. 113.
(7) 3 M. & S. 533.
(8) 14 C. B. 582.
(9) (1798) 8 T. R. 71.

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There, to an insurance broker's action on a policy, the underwriter, being under terms to plead issuably, pleaded that the parties interested were alien enemies. Thereupon the plaintiff signed judgment, and successfully resisted a motion to set it aside, because in a judge's order "pleading issuably" meant pleading to the merits. If it were not for *Le Bret* v. *Papillon* (1) it might be thought from some of these cases that, in one way or another, it was possible for an alien enemy to obtain a judgment from a Court, which had been told that he was an alien enemy, and that the Court could not refuse to admit him if the defendant, either from negligence or design, failed to give them the ritual opportunity of doing so. I do not, however, find any case in which the enemy was eventually allowed to succeed if the fact of his being an enemy was established. The proposed plea may often have been unfounded, and only put forward for delay, and then it was not unnatural to say that a mere allegation of enemy incapacity should not be used to gain time, unless it was made strictly in accordance with the rules. If at the trial the fact of enemy incapacity became apparent, *Le Bret* v. *Papillon* (1), I take it, would always apply. In any event, the whole of this system of practice has changed, and cases decided under it do not govern a case arising to-day, if their ratio decidendi was the system of practice and no more. Where the practice was itself the mode in which expression was given to the principle it would be otherwise, but no statement of principle is to be found except that in *Le Bret's case*. Nowhere is there any suggestion that, as the rule rested on the ground of public policy, and there was inconvenience to a British partner, whose action "in substance" it was, the rule was capable of being moulded, or qualified, or was inapplicable, though the inconvenience lay on the surface in *M'Connell* v. *Hector* (2) and in *Flindt* v. *Waters*. (3) When the point was decided on demurrer there was never any such objection as might have been expected, namely, that, the matter being one of public policy, the facts ought to be inquired into, or that the pleading demurred to was bad for want of allegations, showing how the facts stood

(1) 4 East, 502. (2) 3 B. & P. 113. (3) 15 East, 260.

that would raise the question of public policy. Some resourceful pleader, unable to reply sub salvo conductu or commorancy by the King's licence within the realm, would surely have replied to the regular plea of alien enemy that there were circumstances of inconvenience, to wit, delay in winding up a partnership in which loyal subjects were concerned or what not, which made it contrary to public policy that such a plea should prevail, if any such principle existed. Under the system of pleading (or in the absence of it) then prevailing, Mathew J. allowed *Janson's Case* to be tried under an agreement "that no dilatory plea should be set up, based upon the fact that the plaintiff company was alien, and could not sue while the war lasted. The case, it was agreed, should be dealt with as if the war were over." (1) In your Lordships' House Lord Davey (2) questioned if such an agreement was permissible. Lord Lindley, while citing *Le Bret* v. *Papillon* (3) with approval, thought that the agreement in question might be justified under *Flindt* v. *Waters* (4)—I must confess I do not know how—for the plaintiff Flindt was a British subject, while the Driefontein Company was an enemy company. For what my opinion may be worth I have long thought that such an agreement as Mathew J. allowed should not have been tolerated. At any rate, what then took place is no authority for saying that a Court can only take notice of the plaintiff's incapacity when the defendant pleads it, and I think that no question of pleading or practice can now obscure the Court's duty to enforce this rule when once its nature and limits have been ascertained. The decisions in *In re Mertens Patent* (5), *Aniline Co.* v. *Levinstein* (6), and *Candilis & Sons* v. *Victor & Co.* (7) show that effect ought to be given to the enemy's incapacity wherever it is found to have arisen. It may be done even upon a summons to transfer to the commercial list (*Ingle* v. *Mannheim Insurance Co.* (8)), or in the Court of Appeal. Such, too, has been the practice in Scotland; see Lord Skerrington's

(1) [1900] 2 Q. B. 343.
(2) [1902] A. C. 499.
(3) 4 East, 502.
(4) 15 East, 260.
(5) [1915] 31 Times L. R. 162.
(6) 31 Times L. R. 225.
(7) 33 Times L. R. 20.
(8) [1915] 1 K. B. 227.

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judgment in the case of *Orenstein* (1), which collects the authorities. The instances in which an enemy is allowed to be heard in the Prize Court are exceptional. They do not depend on the rules of law applicable to municipal courts. The older practice allowed an enemy to appear to claim only when he came under "some act of public authority that puts him in the King's Peace pro hac vice. Otherwise such a person was regarded as totally ex lege." The existence of the Hague Conventions has led to an extension of this practice in the case of an enemy claiming the benefit of them: *The Möwe* (2); *The Pindos.* (3) I only mention the matter lest it should seem to have been overlooked.

So much for the pleading point. Perhaps I may here dispose of *Rombach* v. *Gent* (4) also. Apparently the learned judge thought that the plaintiff, by getting himself appointed receiver in the action for dissolution, could enable himself to do what otherwise would fail for non-joinder of his enemy partners. I do not know how an order made in the Chancery Division enables a plaintiff to disregard the law in the King's Bench Division. As receiver, his business was to receive. He could not sue for the debt as a contracting party without the other contracting parties: *In re Sacker* (5), and I infer that nothing was vested in the receiver, for the action was brought by him in his own person only, and Lush J. says, as is said here, "it was the receiver's action in substance," and "he brought the action under the protection of the Court," considerations which, in my opinion, do not affect the inherent incompetence of such an action. The choses in action could only have been vested in him by an order, the propriety of which in time of war I take leave to doubt, for it would obviously open the door to a ready mode by which an enemy could collect his English debts without any safeguards or any compliance with the substance of the law. The public custodian is the proper person, and not a co-partner, in whom the interest of the enemy partner

(1) 1915 S. C. 55, 64.
(2) [1915] P. 1.
(3) [1916] 2 A. C. 193.
(4) 31 Times L. R. 492.
(5) (1888) 22 Q. B. D. 179.

should be vested. As it stands, I think *Rombach* v. *Gent* (1) was ill decided.

Next, the majority in the Court of Appeal seem to have thought that Herr von Speyer might have been joined as a defendant if not as a plaintiff, and that this would have mended matters or even have removed all difficulty. I cannot follow this. Whatever power a managing partner may have, or even any partner if not expressly restrained, to bring an action in the firm's name for a firm debt without obtaining the partner's special consent, no such power can make his doing so more legal or more competent than if the consent had been obtained. The same is true of Sir Edgar Speyer's arbitral power under Article 9. In neither case could one or all of the other partners make Herr von Speyer a competent party by using his name on their own authority. Again, it is not shown that he was not willing to join as plaintiff; but even assuming that he could be made a defendant for the convenience and by the mere choice of his co-contractors, how is his position the better for that? The result is still that, if judgment is recovered, it must be a judgment in favour of the five plaintiffs and of one of the defendants, Herr von Speyer, and then, under whatever disguise, he would be a successful actor in the courts of His Majesty, whose enemy he is. Is our law so foolish and is justice so blind that this disregard of the rule, if it be a rule, can be got over by calling a plaintiff something else? The notion of making him a defendant and then pretending that all is well, seems to me to be insupportable.

Nor is it enough to say that Herr von Speyer's interest in this particular debt is only such as a member of a dissolved partnership has in assets of the former firm pending its liquidation. It is so; but what of it? A judgment in his favour, although jointly with others, would cause an immediate improvement of his position in one way or another. The course described in para. 3 of the affidavit at p. 79 of the Record is quite inconsistent with the continued existence of any outstanding debts to third parties from the firm of Speyer Brothers of 1914. If so, the recovery of this judgment

(1) 31 Times L. R. 492.

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against the defendant would forthwith assure pro tanto the ultimate reduction of Herr von Speyer's debts to the firm, and forthwith diminish his liability for interest, if any. Even if there are still debts outstanding towards the payment of which whatever is recovered from the defendant might be applied, the result is still the same; for to that extent a debt due from Herr von Speyer jointly with the others and, if due to persons in neutral countries, presently enforceable, would be discharged.

It is a fallacy to suppose that everything turns on not remitting money to Germany during the war. I know that Rooke J., no great authority, says something like this in *M'Connell* v. *Hector*, though entirely proprio motu; but the mischief is not confined to cases of present cash enrichment of an enemy. A British partner who paid to a Dutchman during the war a firm debt contracted before the war by his Frankfort partners has been convicted of "paying a sum for the benefit of an enemy country," contrary to the Proclamation of September 9, 1914: *Rex* v. *Kupfer*. (1) So here there would be a recovery of the sum for the benefit of an enemy, whether Herr von Speyer handled the cash or not. Even if judgment only were recovered against Señor Rodriguez without satisfaction, Herr von Speyer would benefit at once by getting an interest in a specialty debt secured by a charge, in lieu of an interest in a debt only due upon a simple contract and unsecured. No order to keep the cash in this country during the war would deprive him of this immediate improvement of his position, nor is it impossible that, in some neutral country where the defendant may have property, he might actually recover satisfaction in respect of some right under the English judgment.

My Lords, we always come back to the real question. What is the rule on this subject? As I understand them Bankes L.J. and Sargant J. proceeded on the following grounds: (1.) The rule which disables an enemy alien from being an actor in legal proceedings, in which the recovery of a judgment will enure to his benefit, is only a rule of public policy

(1) [1915] 2 K. B. 321.

(2.) It would be against public policy that Sir Edgar Speyer and his British or neutral co-partners should be prevented from completing the liquidation of the affairs of the former partnership during the war. (3.) Therefore the action should proceed by remitting it to the Master to inquire whether the defendant has any meritorious defence (the objection that one of the plaintiffs is an enemy alien being for this purpose unmeritorious); and, if he has not, judgment should go for the full amount, with a charging order and an order for the appointment of a receiver in favour of this alien enemy jointly with the others under the firm name of Speyer Brothers. I will proceed to examine these positions.

Any discussion of our law on the question of an alien enemy's disability as an actor in litigation in our courts naturally starts with the writings of Lord Coke. From him we may work backwards or forwards. For the earlier period discussion takes the form of criticism of his statements and authorities; after his time, until quite recently, there is little to be done except collect instances of the application of the rule and to note the development of the methods of pleading the point. The authorities before the seventeenth century are not very numerous. The inability of an alien enemy to sue at all is recognised in the time of Henry VI., and the substance of the necessary plea is already stated: "Le defendant dit que le plaintif est et fuit jour de brief purchase un alien ne de south le legiance le Roy de Denmark qui est enemy": 32 Hen. 4. Hil. T. pl. 5. An enemy as such cannot sue; secus if he comes with the King's licence or safe conduct. So, too, is 19 Edw. 4, T. pl. 6. I do not think that anything can be gathered for the present purpose from the earlier position of mere aliens in England, or that it is useful to inquire how and why a period of toleration of strangers was followed by one in which all aliens were treated as enemies, to whom legal rights were denied, and that again by a later period, in which alien merchants enjoyed permission to trade and, apparently as a consequence, a limited right of suit. At an early date they resorted to the Lord Chancellor; but this proves nothing. The petitions collected in vol. 10 of the

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Selden Society's Publications, Select Cases in Chancery, are all presented by alien amis. They appeal as much to the administrative as to the judicial powers of the Chancellor; and there is nothing to show that, when the alien amy is thereafter found a litigant in the King's courts of law, his altered position is due either to the interference of the Chancellor's jurisdiction or to any conscious application of notions of public policy. I expect it had something to do with fees. At any rate, there seems to be no ground for thinking that in this case equity moderated the rigour of a common law rule. Commentators and compilers of abridgments at most connect the alien amy's rights to sue with the right to trade, and the right to trade, whether it originates with the King's licence or with Magna Charta or with particular Statutes, does not arise from any rule of policy formulated by the Courts. As for the alien enemy's right to sue, clearly it derives from the King's safe conduct direct. On the other hand, it is long before any reasons come to be given for the alien enemy's disability. I should think it was taken as obvious by the mediæval mind. Dyer [2 b. Case 8] simply says: "he is an enemy of our Lord the King, in which case he shall have no benefit from his laws," and no bad reason either; and to the like effect is the case in Owen [p. 45] and *Watford* v. *Masham* (1) where if it be an enemy case at all, no doubt, "nul" is omitted before the words "action de debt," for, as was pointed out as early as Carter, p. 191, the case in Moore "is against the authorities of all our books" as it stands.

Lord Coke's statement in the Institutes, already mentioned by your Lordships, is almost identical with that in his report of *Calvin's Case* (2), which is also worth quoting: "An alien friend, as at this time . . . . may by the common law . . . . acquire . . . . any . . . . goods personal whatsoever, as well as any Englishman, and may maintain any action for the same. . . . . But if this alien become an enemy . . . . then is he utterly disabled to maintain any action." Observe this is by the common law. Coke is unconscious that any tribunal other

(1) Moore, 431

(2) (1608) 7 Rep. 17 a.

than the Courts of common law had been concerned in thus deciding, or of any qualification or mitigation of that law whatever, nor do I think that his comprehensive and exact mind can have stated the matter so absolutely without considering and dismissing such an obvious case as that of a firm with an alien partner who becomes an enemy by the outbreak of war.

For nearly two centuries the decisions go little further than this, except for practice and pleading; see 1 Wms. Saunders (1871 ed.), pp. 3 to 5, Notes to (1666) *Jevens* v. *Harridge*. There is often a good deal to be gleaned on legal points of some antiquity by consulting the abridgments and digests, the books of entries, and precedents of pleadings of the 16th, 17th and 18th centuries. As far as I can find, they all agree, and treat the rule as to suits by alien enemies as an unqualified rule of personal disability. They so describe it and so explain it, and they accept it uncritically as axiomatic in our law. Rastall, Clift, Wentworth, and the Modern Entries are all to the same effect. In our own day Dicey on Parties and Bullen and Leake's classic, third edition, take the same line. There is a finished example of the plea in *Le Bret* v. *Papillon*. (1)

It is suggested now that this rule is nevertheless neither absolute nor unqualified, and that the decisions are not inconsistent with its being held inapplicable here. I think it would be difficult to find another rule so little qualified over so many centuries. When first we hear of it, not long after the beginning of recorded decisions, it was already clear; we never find it emerging from doubt into certainty under the influence of successive decisions, if that is what is meant by "crystallising." It has always been as certain as language could make it, as curt as the Commandments. It has never been doubted. The current of decision has run strong and steady, and always the same way. It has always been a rule of personal disability. Historically, the King's courts have never been open to all comers without exception. Before yet they were fully grown it was established that

(1) 4 East, 502.

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a considerable number of persons could not seek the King in his courts to pray for legal redress, and an alien enemy was among them. His disability he shared with outlaws and felons, with persons excommunicate and persons professing religion, not being "persons politique," as Lord Coke says, and some others. Exceptions, such as they are, depend on grounds not germane to the present case. The abbot alienigena could sue in respect of the property of his religious house situate within the realm not as a natural person foreign born but as an English person politic. Similarly, when it is said that an alien enemy can be an executor, and as such can bring actions flagrante bello in respect of the testator's estate, this is possible only because he sues en autre droit. As to this right the decisions before 1870 were certainly in conflict, and the text writers, on the whole, were adverse to it. The passage in Bacon's Abridgement relied on by Bankes L.J. is really an extract, slightly altered, from Chief Baron Gilbert's History of the Common Pleas, p. 166, in which he says that there has been great debate on the point, but expresses no opinion of his own, and cites no authorities except those which were cited to your Lordships during the argument. He mentions the disadvantage to the devisees if the executor is excluded from the courts, but the decisions quoted do not treat this as the reason for holding that an alien enemy can sue as executor even in the few cases in which it was so held. So, too, Williams on Executors left the point quite undecided in his text from 1832 to 1873, and the note, so much relied on, if critically examined, is not exact in its treatment of the cases, and expresses only a guarded doubt. If s. 2 of the Naturalisation Act, which enables aliens to hold all kinds of property, and so removed most of the difficulties which encumbered the path of the alien executor, did really by implication allow an alien enemy executor to sue during the war, it is again important to observe that it was a statute and not a judicial decision that settled this. Whether it had that effect or not need not now be discussed, for at any rate the only ground for enabling the alien enemy in this regard would be that he would sue en autre droit ; and I think that the

important point in this connection must be that he sues as executor, en autre droit only, and not as a party interested, in his own right. This is borne out by the parallel case of outlawry. An executrix married, and sued to recover a debt due to the estate. It was pleaded in bar that her husband was an outlaw, and Lord Coke decided against the plea: "By this outlawry clearly the husband forfeits nothing of the goods which the wife had as executrix, for that he only had them in the right of his wife as executrix." (1) Now, it is only possible to say that Herr von Speyer is on the record here, suing en autre droit, by assuming that, as against the defendant, he sues as trustee for certain beneficiaries, the other partners in Speyer Brothers of 1914 to wit. A trustee he is not, nor is he so described on the writ; and, if he was, he would still sue for his own benefit as well, and not purely en autre droit.

I believe that much confusion has crept into this case by forgetting that this firm was not an incorporated company, nor in any sense an entity distinct from the persons of the partners. Sargant J. says that the recovery of the debt would be a recovery "for an English trading unit," whatever that is, and that "the action is not von Speyer's so far as any directing mind is concerned." This must mean that Herr von Speyer sues not for himself at all but for others, like a bare trustee. It is said that if a British subject, or, I suppose, an alien amy for that matter, sues as trustee for the benefit of an alien enemy the action is competent, though if the Court is apprised of the plaintiff's position some stay of execution or order for payment into court may be imposed, and it is thence inferred, I do not see how, that conversely an alien enemy must be able to sue as trustee for the benefit of a British subject. *Kensington* v. *Inglis* (2) and *Daubuz* v. *Morshead* (3), on the one hand, and *Mercedes-Daimler Motor Co.* v. *Maudslay Motor Co.* (4) on the other, are relied on here. With *Kensington* v. *Inglis* (2), *Brandon* v. *Nesbitt* (5) and *Bristow* v. *Towers* (6) should be read. The

(1) 3 Bulst. 211.
(2) 8 East, 273.
(3) 6 Taunt. 332.
(4) 31 Times L. R. 178.
(5) 6 T. R. 23.
(6) Ibid. 35.

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broker Brandon averred interest in persons, who were enemy aliens, and on that fact being pleaded replied that the parties interested owed him for premiums more than the amount insured, and relied on his broker's lien and set off as equivalent to an insurable interest in himself. He failed, for he had no interest that would support an indemnity, and this although the replication had clearly made one of the points relied on before your Lordships—namely, that there would be no impolicy in letting the broker recover, since he would not let the money go out of the kingdom, "which is an answer to Dyer 2 b, p. 26." As for those who had—namely, his clients, the assured,—a contract to indemnify them would be illegal as in the nature of trading with the enemy, and as protecting against British capture. Kensington, on the other hand, averred interest in an alien enemy, whose ship, the subject-matter of the insurance, was engaged in a trade licensed under the King's authority. If so, such dealing with the enemy as it involved was an authorised trade, and Kensington recovered in trust for the Spanish shipowner as if he had been an alien amy, though without a safe conduct he could not come here to sue. It should be noted that the public policy referred to in these cases is that only which forbids trading with the enemy. The rule that an alien enemy is disabled from suing is a personal "non-abilitie" (as it is called in Brooke's Abridgement, p. 62), independent of the character of his cause of action on public or other grounds, of which Lord Kenyon, speaking in 1791, says: "An action would not lie either by or in favour of an alien enemy," and adds that they "had not found a single case in which the action had been supported in favour of an alien enemy." On the other hand, Lord Ellenborough says in *Kensington's Case* (1) that in *Brandon* v. *Nesbitt* (2) "any protection afforded to such property, by means of a contract of indemnity, directly and materially contravened the public interest, which was concerned in the precariousness or destruction of such property. In the present instance no such public policy of the country is contravened by sustaining and giving effect to such a trust. . . . . And although

(1) 8 East, 290. (2) 6 T. R. 23

the King's licence cannot, in point of law, have the effect of removing the personal disability of the trader, in respect of suit, so as to enable him to sue in his own name; it purges the trust, in respect to him, of all those injurious qualities in regard to the public interest, which constituted the particular ground of objection" in *Brandon* v. *Nesbitt*. (1) "As, therefore, there is in this case no legal incompetence to sue in the parties suing, and no public interest which stands in the way of the maintaining this suit," the plaintiff recovered for his client, the Spaniard. This is no authority for saying that an alien enemy can sue successfully under cover of a trustee, for first of all Kensington sued on a contract, to which he was himself a party, and secondly, he averred interest in a client, whose enemy character was purged by the licensing of the trade in question. *Daubuz* v. *Morshead* (2) is a nisi prius case, so far as this point goes poorly reported; and, as the plaintiff was an English holder of a bill of exchange, his success in the action proves nothing to the purpose. The case of the *Mercedes Co.* is also shortly reported. If, as appears, the alien enemy plaintiff was a bare trustee for the English plaintiff, it may be supportable, but in that case it need not be considered now. If the alien enemy company sued for its own benefit, though jointly with the English company, I think the decision was wrong. The final answer, however, to both these cases, that of the executor and that of the trustee, is that the enemy plaintiff here is neither; that these cases, if treated as exceptions to, or mitigations of, the personal disability of the enemy, do not affect the rule, for in the former the enemy does not sue for himself, and in the latter the trustee has never, so far as I know, recovered and certainly ought not to be allowed to recover for the enemy's benefit, unless the cause of action arose under a licence which made the enemy quasi sub protectione domini regis.

Reference has been made to the cases on ransom bills, as to which it is evident that some difficulty was found in reconciling them with the two standard rules which prevented a subject from trading with the enemy and prevented an

(1) 6 T. R. 23. (2) 6 Taunt. 332

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enemy from suing. Much ingenuity and erudition were expended in supporting such actions. An anonymous decision of Lord Hardwicke's, mentioned in the argument in *Ricord* v. *Bettenham* (1), to the effect that "an alien enemy may sue as executor or for an account," was there supposed to support a ransom bill, as though the enemy plaintiff sued on the bill en autre droit, which he pretty clearly did not. Lord Mansfield says in *Cornu* v. *Blackburne* (2): "This is a contract which arises out of a state of hostility, and is to be governed by the law of nations, and the eternal rules of justice" (to which no lawyer appeals except in extremity), and it is difficult to see why an action by the holder of a bill of exchange should be governed by the law of nations, or, as *Antoine* v. *Morshead* (3) suggests, be tried in a Court of Prize, unless it was felt that by the common law the action must fail. It seems incredible that, unless the principles of the common law were fixed, judges, anxious to assist British prisoners of war and to facilitate the recovery of prizes from captors, should not have said that in substance these were actions for the British party interested, without which no prisoner could supply himself with funds and no shipowner could recover his ship, and therefore the rule might be moulded and an exception might be made. The only explanation is that no such theory had ever been heard of.

My Lords, there are two quite separate principles to be considered in connection with contracts with an alien enemy. One forbids a subject to make or to perform certain contracts with an enemy. The other limits or, as I think, denies the capacity of an enemy, not enjoying the King's protection, to enter the Courts as a suitor. Both commonly arise in the same case, and observations germane to the one are apt to be transferred or referred to the other. This, again, is a fertile source of confusion. The statement that both are based on the same broad considerations of public policy is historically without foundation, and finds no support in the books. The latter was full grown centuries ago; the former only attracts

(1) 3 Burr. 1741. (2) 2 Doug. 648.
(3) 6 Taunt. 237.

much attention towards the end of the 18th century. The rule against trading with the enemy always is rested on public policy, and is represented as guarding the country against a public mischief, yet, even so, it has long been clear that the rule is now absolute as far as the Courts are concerned, and admits of no relaxation in the interests of a profitable trade. Buller J. narrates in *Bell* v. *Gilson* (1) how Lord Mansfield used to tolerate insurances of enemy property by British underwriters on the ground that they were good for business, but no one defends this, and the law is now well settled to the contrary. (2) The other rule has only recently been connected with public policy at all, and then only for the purpose of finding a modern explanation for supporting its invariable enforcement. Sir William Scott in *The Hoop* (3), after dwelling on the public mischiefs, which are the ground for forbidding all trading with the enemy, passes to what he calls "another principle of law of a less politic nature, but equally general in its reception"—namely, an enemy's total inability to sustain any contract by an appeal to tribunals, an inability due to the hostile character with which enemy subjects are invested by the fact of war. Indeed, the enemy's inability is not confined to contract or to trade. He could not sue in tort nor could he sue on any contract except when under protection. Now it is only this principle "of a less politic nature" with which we are here concerned, and I think it is very significant that personal disability is the gist of it, applied without consideration of the effects.

Passages like the following are easily collected. Lord Coke, who classes præmunire with outlawry, excommunication and enemy alienage, says of the first, "he that is out of the protection of the King cannot be aided or protected by the King's law or the King's writ," just as Bracton (4) says of an outlaw, returning from outlawry without the King's pardon, "nor will he be able to appeal others, because he has lost all law." An alien can bring personal actions "if there be no war between this realm and the kingdom to which the

(1) (1798) 1 B. & P. 345, 354.
(2) [1902] A. C. 494
(3) 1 C. Rob. 196, 200.
(4) Ch. XIII., 5 and 7.

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alien belongs, for then he is an enemy of our Lord the King, in which case he shall have no benefit from his laws." (1) The reason why an alien enemy can sue when coming to this country under safe conduct is given in *Wells* v. *Williams*. (2) It is not that at common law judges are to relax or enforce the disability according to public policy or the convenience of British subjects concerned, but that "suing is but a consequential right of protection: and therefore an alien enemy, that is here in peace under protection, may sue a bond." The passage in *Tuerloote* (or *Tirlot*) v. *Morrison* (3) that the law allows an alien merchant "safe conduct with his goods, because it is beneficial to the King in his customs," is not found in the fuller report in 1 Bulstrode, 134. "When I mention these rights of an alien," says Blackstone, "I must be understood of alien friends only, or such whose countries are at peace with ours; for alien enemies have no rights, no privileges, unless by the King's special favour during the time of war." "The disability to sue is personal," says Macdonald C.B. in *Daubigny* v. *Davallon*. (4) "It takes away from the King's enemies the benefit of his Courts," and so on.

No doubt the rule in question is a rule of public policy, as all general rules, which the law maintains, must be deemed to be for the public good. The application of the rule is not in the election of private persons. Its theory connects it with State policy not with private right. Lord Davey speaks of it as based on considerations of public policy in *Janson's Case* (5), and the Court of Appeal calls it a rule of public policy in *Porter* v. *Freudenberg*. (6) The same might be said of service of writs out of the jurisdiction. It was not, however, in this sense that it was treated in this case by the Court of Appeal. So estoppel by matter of record is a rule of public policy, for interest rei publicæ ut sit finis litium, but the only question is whether there is res judicata or not; so "The King can do no wrong" states a rule of the highest public policy, but leaves

(1) 1 Dyer, 2 b 8.
(2) (1697) 1 Salk. 46.
(3) (1611) Yelverton, p. 198.
(4) 2 Anst. 462.
(5) [1902] A. C. 484, 499.
(6) [1915] 1 K. B. 857, 868, 884.

nothing to the opinions of the age in the application of it. I can find no warrant in the cases for thinking that the rule against enemy suitors is less fixed or more exposed to the effect of change in opinion from time to time. I have tried—but with indifferent success—to make out who first spoke of public policy in this connection. I think it was Sir T. Plumer, V.-C., who in *Albrecht* v. *Sussman* (1), I daresay desiring "to justify the ways of law to man," remarks, "the argument from the injustice, which may be the effect of this plea in the particular instance, is answered by the observation, that it stands on public grounds. . . . . And the failure of private justice, assuming that to be the result of the plea, is a sacrifice due to public policy." Surely these weighty words form a not inappropriate answer to much of the reasoning of Bankes L.J. and of Sargant J.

If, however, that aspect of public policy is invoked which is illustrated by *Egerton* v. *Earl Brownlow* (2) and *Nordenfeldt's* case, it appears to me to be inapplicable to such a case or such a principle as your Lordships have before you. Considerations of public policy are applied to private contracts or dispositions in order to disable not in order to enable. A man validly contracts as he will because he is a free man; he validly disposes of his property as he will because it is his own. The Courts, on grounds of policy, declare contracts in restraint of trade to be unenforceable and dispositions in perpetuity or which fetter the prerogative to be invalid. I never heard of a legal disability from which a party or a transaction could be relieved, because it would be good policy to do so. When it had been established that the reasonableness of restrictive covenants upon a trader's prosecution of his calling was a factor in their permissibility, it followed naturally enough that in judging what is reasonable the relevant conditions of trade must be looked at as at the time when the question arises. The principle itself is that one party may impose reasonable restrictions upon the other. Where reasonableness is not an element in a principle the case is otherwise. Ex turpi causa non oritur actio I suppose can only be modified by statute,

(1) 2 V. & B. 323, 326. (2) 4 H.L.C. 1.

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even though in a particular age public views of commercial morality may veer in the direction of doubting whether honesty really is the best policy. No Court could allow a departure from the rule which forbids trading with the enemy, let public opinion change as it will. To do so would be to trench on the domain of the executive in advising on the exercise of the King's prerogative, the very thing which so much alarmed this House in *Egerton* v. *Earl Brownlow* (1). Where a statute forbids a thing to be done by contract the grounds of the prohibition are irrelevant. I do not see that they become more relevant where the prohibition is imposed by an established rule of law. If the application of a rule founded on public policy admits of doubt, it is legitimate to consider that policy, in order to decide whether the case falls within the public mischief, which the rule purports to prevent, but when the rule and its application are perfectly clear and admit of no doubt the mischief must be assumed, and the policy needs no inquiry. I recall, without quoting them, Lord Halsbury's words of warning in *Janson's Case* against new heads of public policy, and will only say that in my opinion so well settled is the rule against enemy suitors, be its historic origin or its judicial foundation what they may, that any attempt to apply it anew on some idea of adapting it to the convenience of a particular case is an attempt to exercise a dispensing power. As Alderson B. said in advising your Lordships' House in *Egerton* v. *Earl Brownlow* (1): "My duty is as a judge to be governed by fixed rules and settled precedents."

To turn to the particular argument urged by the respondents, their case, very ingeniously put, I understand to be this. The rule they say never applied to actions " in substance " brought by or under the direction of or for the benefit of British subjects, for that would be against public policy. No single test can be laid down by which to settle of what character an action is " in substance." The test of the proportion in which the enemy plaintiff is interested was disclaimed, for what really concerns public policy is that the enemy should not be enriched

(1) 4 H. L. C. 107

during war. I think this disclaimer, at any rate, is right. To inquire whether more harm will be done by inconveniencing the British plaintiffs than by barring the enemy suitor is to make the question of public policy a mere question of degree in every case.

I notice, first, the extreme vagueness of this proposition. The action must "in substance" be an English action, but that does not depend on the shares which the respective partners may have in the firm. On what, then, does it depend? If it depends on the right of the English partners to use the enemy partner's name without his specific consent, he is still a plaintiff liable for costs, and cannot be denied all control over the action in which his interest may overshadow that of the others. If so he is an actor in the suit, no matter at whose instance he came into it. Otherwise the contention would be the converse of the decision in *Stevenson's Case* (1), and would enable the English partners to make use of the enemy partner's name and interests for their own benefit and behind his back. Sargant J. seems to have thought [Appdx. p. 119] that the present action was "in substance" under the control of the directing mind of Sir Edgar Speyer, an English partner. The plaintiffs are not a company. We are dealing with co-contractors, all natural persons. Further, Article 9, which is relied on, only applies to "questions upon which there may be any difference among the partners," and there is no evidence or suggestion that any difference on this or any point has arisen among them. When Lord Parker of Waddington said in *Daimler's Case* (2) that the rule "has to be applied to modern circumstances as we find them, and not limited to the applications of long ago," he was speaking of the rule against trading with the enemy, and applying his words to this case, I think that we ought not to limit the rule against admitting an enemy to sue to the applications of long ago, but should apply it in accordance with principle to an enemy suing jointly with co-contractors. In that case a company, formed and registered under English law, and as such a body politic distinct from its corporators, was alleged to be of enemy character, and it was

(1) [1918] A. C. 239. (2) [1916] 2 A. C. 344.

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suggested that the control of its affairs by a preponderant body of enemy shareholders or directors would afford the same test for determining enemy character as is afforded by residence among or adherence to the enemy in the case of a natural person. Such cases are common; *The Indian Chief* (1), *The Portland* (2), *The Jonge Klassina* (3). *Daimler Co.* v. *Continental Tyre and Rubber Co.* (4) involved a test appropriate to an incorporated person for the purpose of determining the same character. Here, however, there is not, and never was, any doubt about the enemy character of the natural person Herr von Speyer; and, even if the articles made him the puppet of Sir Edgar Speyer, they would not give him a persona standi in judicio during the war. Again, the passage at [1916] 2 A. C. p. 347 was quoted as rendering Herr von Speyer's presence on the record as a plaintiff permissible. My noble friend was there considering the suggestion that conduct, otherwise lawful, could be rendered unlawful by the bare fact that it might have as an ulterior consequence some enrichment of persons, at present enemies, after the conclusion of peace. In meeting this he dealt, firstly, with the business of a company earning profits by lawful trade and declaring dividends, which, where shareholders are enemies, will not be paid to them during the war; secondly, the similar case, where a trustee carries on a business and has some enemies among his beneficiaries; thirdly, the case of moneys in the hands of a trustee, which he desires to pay into court in order to relieve himself. It was irrelevant in such an argument to inquire whether an enemy could carry on business or do acts connected with a business in England in the capacity of a bare trustee, and to contemplate that an enemy might carry on his business in England during the war under the disguise of a trustee trading for him (5) would have been contrary to the whole tenor of that and every other opinion of that great man. The trustee to whom he referred was one to whom, for

(1) (1801) 3 C. Rob. 12, 22.
(2) (1800) 3 C. Rob. 41.
(3) (1804) 5 C. Rob. 297.
(4) [1916] 2 A. C. 307.
(5) [1917] 2 Ch. 177.

example, a business had been left in trust to carry it on for the benefit, say, of a testator's children, some of whom might have married German husbands. He had in mind neither any consideration of a trust, relied on as an answer to the incapacity of an enemy to sue, nor any contemplation of a trust adopted as a device to defeat the law against trading with an enemy.

My Lords, the respondents' argument is adapted to the case of partnerships "in substance" English. Can it be limited to the actions of British subjects? The courts are freely open to neutrals; why does not this principle equally apply to them? Why should not five Danes or five Swedes bring such an action, joining an enemy partner to complete the body of co-contractors, and say "in substance it is a neutrals' action"? Yet, if so, where is the public policy in allowing it, and what British interest is concerned? Now, can the Courts either refuse to the neutrals execution on their judgment, or, if they grant it, ensure that the neutrals shall wind up their affairs without any roundabout enrichment of the enemy? Why should such an argument stop at the case of partners? Suppose joint owners of a horse hire him out, not being partners but making a joint contract. The outbreak of war makes one of them an enemy. Is an action to recover the hire affected by the disability of the enemy co-contractor? If not, there is no particular efficacy in basing the argument on the position of partners; if it is, where is the public policy in being careful of the interests of partners and careless of those of mere joint owners? It has been said that the right to trade involves the right to sue for the protection of that trade. From that I should have thought the true conclusion was that all right to sue ends, at any rate, pro tempore, when the right to trade ends—namely, on the outbreak of war. *Ex parte Boussmaker* (1) has been fully explained in *Freudenberg's Case*. (2) There is all the difference between asking the Court to grant you something better than you have got—namely, a judgment, which is the effect of suing on a simple contract—and calling the Court's

(1) 13 Ves. 71. (2) [1915] 1 K. B. 857.

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attention to the fact that it has got hold of something which is yours already, and ought not to give it away behind your back. In *Boussmaker's Case* (1) the statute then in force, 5 Geo. 2, c. 30, s. 26, provided that at the meeting mentioned "the said Commissioners shall admit the proof of any creditor's debt, and shall assign every such bankrupt's estate and effects to such person or persons as the major part in value of such creditors . . . . shall choose." To admit one of such creditors, though an enemy, to protest against the distribution of the estate in favour of the other creditors, till he can be fully heard after the war, is no warrant for modifying the rule that an enemy cannot sue for beneficial relief flagrante bello.

Let it, however, be assumed that a court of law can adapt or modify the law about alien enemy plaintiffs when it thinks it to be in the public interest to do so, and that considerations about trading with the enemy are fully in point here; how do such considerations stand in this case? It is plain that, whatever mischief is to be apprehended from trading with the enemy on the ground of the dangerous communications to which it opens the door, is equally to be apprehended here. If an alien enemy can sue, providing he joins as co-plaintiff a British or neutral partner, he can also instruct his own solicitors and counsel, for to oblige him to place the whole conduct of the case in his co-plaintiff's hands might deny him justice. If his case is to be properly conducted he must have full communication with his advisers, I do not say without being censored, but certainly with as little delay and restriction as possible. On the same ground he may claim to attend the trial in person and with his witnesses, even though they, too, are alien enemies. No doubt he cannot make this claim as of right or without being subjected to precautions, but how difficult it must be to refuse the claim and so frustrate that access to the Court which the liberality of a progressive and adaptable law has assured; yet what a channel is thus opened up for communication between this country and that of the enemy, through the medium of bona fide actions at law, which it would be part

(1) 13 Ves. 71.

of the enemy plan that its subjects should be in a position to bring! Trading with the enemy might almost as well go on unhindered if the right of litigating in our courts is a right which the enemy can always claim in a well-chosen case.

In the present suit, what are the objects for the sake of which the law is to be altered on the ground of policy? None that I can see but two. One is to save Speyer Brothers the expense of paying the costs thrown away by having begun this action on the wrong lines and without recollecting the rules of English law by which it is governed. The other is to save them the loss of time which might be involved if the proceedings were remodelled in unexceptionable form. I see no public policy in saving them the costs or delay involved in getting their tackle in order. If the interest of Herr von Speyer were vested in the public custodian, and he were then joined as the co-plaintiff instead of the enemy plaintiff, the action, for anything that has been advanced by counsel, could duly proceed, nor has any doubt been raised that this step could be taken if the proper application were made. The public custodian would then sue in virtue of the title vested in him by statute, and not for any private person's benefit, but in discharge of a public duty. Even if there be some obstacle, I do not think the disadvantage of delay in liquidating the affairs of a particular partnership comparable to the public disadvantage which would result from opening our courts to enemy plaintiffs, however respectable the company in which they sue. As for the time it would take, this debt is claimed to have been due and payable before war broke out, and some additional delay would be a small matter. I am therefore of opinion that the disability of alien enemies as actors in legal proceedings in time of war is not a matter so depending on public policy as to warrant any court of law in departing from or relaxing it in favour of any alien enemy, even though they sue as members of a dissolved British firm. I am equally of opinion that if such a thing could be done the dissolved firm of Speyer Brothers of 1914 has no claim to indulgence.

The other way in which this case has been put is that,

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apart from public policy and the circumstances of this case, the question is really one of the true extent and meaning of the rule. This view is that the rule does not apply when its application would debar persons, to whom our courts are open, from enforcing their rights and adjusting their business interests with the assistance of the law. The whole gist of this argument is that it is hard on British subjects, who have been partners with one who is now an enemy, to have the liquidation of partnership concerns impeded. It may be hard, and yet wholesome for all that. The question is whether the rule, as it has been invariably formulated and applied hitherto, can be understood as having been all along subject to an implied and unmentioned limitation that would leave such a case outside it. The argument appears to be that our law cannot be so crude as to work this inconvenience, even if it does date from the Plantagenets, and that if no trace is to be found in the books of this limitation in a history of five hundred years that is because partnerships between subjects and aliens have been few before the age of steam and telegraphs, and because the case has never arisen, owing to our insufficient participation in European wars. I cannot help thinking that there must have been many partnerships between subjects and Frenchmen or Dutchmen during the many wars of the eighteenth century. Really, the contention must be that the disability of an alien enemy, being only personal, cannot extend to disabling other persons, who, in themselves, are competent and meritorious; but if you come to think of it, this is due to the necessity for making all the co-contractors parties to the action, and not to the rule which disables one of them, whether he be a party jointly or severally. Why criticise this rule and undermine its principle on account of hardship which is caused by another rule? As a matter of fact, the law has not much troubled about such collateral inconveniences. Not so long ago the conviction of a partner for felony must have been very inconvenient to the other partners. The knot is said to have been cut in stricter days because the felon's share was forfeit to the Crown, and, as the Crown does not own

property or choses in action jointly with its subjects, it proceeded to oust the other partners from the partnership assets by virtue of the prerogative. But it is long since this was done. In the meantime, I suppose the joint contracts could not be sued on till the felon had served his sentence or obtained a pardon. It was the same with outlawry; and though there are now no outlaws, there is outlawry still. The fact is that a body of law, which, like ours, has grown through a long period of intensely conservative and unsystematic development, is sure to contain gaps—blemishes, if you will—which a philosopher or a nomothete would have contrived to avoid. It cannot be helped. It is too late for law courts to improve or explain them away. That is for the Legislature.

In the result I agree with Pickford L.J., and think that the orders of Peterson J. were right, and should be restored, and that the orders made by the Court of Appeal should be set aside.

Lord Parmoor. My Lords, the question in debate is whether British subjects, or neutral friends, in partnership with an enemy alien at the outbreak of war, which partnership ipso facto then determined, are unable during the continuance of the war to take action to enforce rights which had legally accrued in their favour prior to the outbreak of war, although there is no possibility that, during the war, the enemy alien would be enabled to derive any immediate benefit as the result of the action. It was argued on behalf of the appellant that enemy aliens can have no locus standi in judicio, and that, irrespective of all conditions, there is an inflexible rule of law placing them under a personal disability to appear as plaintiffs, or to be joined as co-plaintiffs, in any action during the period of war, and that whatever the resulting inconvenience or loss to British subjects or neutral friends, they must submit to it, on the ground of public policy. The Court of Appeal decided by a majority against this contention. The question is concisely stated in a sentence in the dissenting judgment of Pickford L.J.: "The older cases, however,

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and *Porter* v. *Freudenberg* (1) are concerned only with the case of a single enemy alien plaintiff, and in this case we have to consider if the same principle applies to the case of an alien enemy suing jointly with British or alien friends." The case of *M'Connell* v. *Hector* (2) might be regarded as not coming within this general statement; but the point really argued and decided in this case was that a British subject, who for all commercial purposes resides under the allegiance and protection of a hostile State, is to be considered, for all civil purposes, as much an alien as if he were an alien by nationality and birth. The learned Lord Justice, however, was of opinion that, so far as the Court of Appeal was concerned, the case was governed by the decision in *Candilis & Sons* v. *Victor & Co.* (3)

I accept the general principle that a single enemy alien plaintiff cannot sue on his own behalf during the continuance of war. This question was fully considered in the case of *Porter* v. *Freudenberg.* (4) It is there stated: "This law was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the State at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State." In this passage the later law is said to be directly founded on public policy, and this does not connote the existence of a general personal disability founded on nationality, or that it is impossible to join an enemy as a party, if the forms of procedure so require, in order to enforce the right of British subjects. It has long been established that a person of enemy nationality commorant in this country is not, as such, debarred from access to the tribunals; whereas, on the other hand, British subjects and neutral friends may have acted in such a manner as to disentitle themselves to the right of such access. In

(1) [1915] 1 K. B. 857.
(2) 3 B. & P. 113.
(3) 33 Times L. R. 20.
(4) [1915] 1 K. B. 857, 867.

the passage from Coke on Littleton to which your Lordships were referred, an alien is a person alibi natus, or, more exactly, a person born out of the ligeance of the King. Such an alien is said to be capable of bringing a personal action on the ground that "an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personal action"; but this right "is to be intended of an alien in league, for if he be an enemy alien the defendant may conclude to the action." Nationality is no longer a test of alienage in the enforcement of civil rights. The test is the place where a person voluntarily resides or the place where he carries on his business or businesses, and a person who is a British subject or the subject of a neutral State is regarded for all purposes as an enemy alien if he is voluntarily residing in, or has the place of his business or businesses in, a hostile country. In *Wells* v. *Williams* (1) "suing is but a consequential right of protection: and therefore an alien enemy, that is here in peace under protection, may sue a bond; aliter of one commorant in his own country." In *Watford* v. *Masham* (2): "Adjudge que alien nee south obedience del enemy la Roigne poit aver accõn de debt sur obligation et pur personal choses." In *Janson* v. *Driefontein Consolidated Mines* (3) Lord Lindley says: "The subject of a State at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality, nor even on what is his real domicil, but on the place or places in which he carries on his business or businesses." Lord Lindley in this passage was dealing only with the case of the place or places where a person was carrying on his business, and to make the statement complete it should be added that the same principle applies to the case of a British subject or neutral friend who at the time is voluntarily resident in the enemy country.

My Lords, in considering a rule of law founded on public policy care must always be taken not to introduce new

(1) 1 Salk. 46; 1 Ld. Raym. 282. (2) Moore, 431.
(3) [1902] A. C. 484, 505.

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principles which, to be valid, would require the sanction of the Legislature, and to maintain the important limitation, that it is beyond the jurisdiction of tribunals to determine matters of national policy.

On the other hand, Lord Watson in *Nordenfeldt* v. *Maxim-Nordenfeldt, etc., Co.* (1) and Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (2) emphasise the necessity of considering modern conditions as they affect the basis on which a rule of law has in reality been founded. Lord Watson says: "Their function"—i.e., the function of the tribunals—"when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time." Lord Parker says: "The rule against trading with the enemy is a belligerent's weapon of self-protection. I think that it has to be applied to modern circumstances as we find them, and not limited to the applications of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what those circumstances require."

My Lords, I think it is sufficiently clear that there is no inflexible rule of law founded on public policy which under all circumstances prevents an enemy alien from having any locus standi in judicio as co-plaintiff, and that to attempt to enforce such a rule would, in the present case, not eventuate in any disadvantage to the enemy country, but in the depriving British subjects of rights which on other grounds they unquestionably possess, and which have long been recognised as an inalienable heritage. In the passage in Coke on Littleton to which reference has been made it is stated that a prior or abbot may bring a real or mixed action concerning his house as acting en autre droit. It does not appear whether this statement applies to an abbot born out of the King's ligeance in a country with which the King is at war, but the rights vested in a prior or abbot, in connection

(1) [1894] A. C. 535, 554. (2) [1916] 2 A. C. 307, 344.

with the property of his house, make it difficult to understand how the property of an alien priory or abbey could have been safeguarded, in the event of a war, if the alien prior or abbot had under no circumstances a right of access to the Courts. The right of an enemy alien executor to bring an action, as such, was discussed at great length before your Lordships, and your Lordships were referred to a note in the 7th ed. of Williams on Executors. It appears that there are precedents both in favour of, and against, the right of enemy aliens who are executors to sue as plaintiffs; but the right was recognised in *Brocks* v. *Phillips* (1) and in *Richfield* v. *Udal.* (2) In this latter case Bridgman C.J. expresses the view that an action by an alien executor doth lie. In principle, there would appear to be no objection, on public policy, so long as no advantage to the enemy alien could accrue as the result of the action. In the present case there is no question of suing en autre droit, but the recognition of such a right is of importance in deciding whether there is an inflexible rule against all access to the tribunals by enemy aliens. Bankes L.J. in this connection quotes at length a passage from Bacon's Abridgement, which aptly draws attention to the conflict which may arise between public utility and private convenience, and to the possible prejudice to the King's subjects who could not recover their debts from an alien executor by his not being able to get in the assets of the testator. I agree with Sargant J. that this passage is "curiously applicable to the circumstances of the present case." Perhaps the strongest case against the contention of the appellant is *Ex parte Boussmaker* (3), which came before Lord Erskine L.C. in the year 1806. Various attempts have been made to explain away the significance of this case, but it is a sufficiently clear authority that, under certain conditions, an enemy alien can present a petition to the Court and be heard upon it. The claim was allowed to be entered, and the dividend of the alien enemy was reserved, with the result that the differential sum could

(1) Cro. Eliz. 683. (2) Carter 48, 191.

(3) 13 Ves. 71.

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be divided amongst the other creditors, after reserving the dividend on the claim. This may differ in form from a case in which an enemy alien comes in the court to prove the existence of the debt and claims judgment on the amount; but it is not consistent with the existence of an inflexible rule that an enemy alien has no locus standi in judicio; and it is noticeable that a distinction is expressly drawn between a debt arising from a contract during war with an enemy alien and a contract which was originally good and which would survive on the return of peace. It has been suggested that this case was not fully argued, but a similar question had been recently considered in *Ex parte Lee* (1), where the proof of debt in an insurance case was expunged on the ground of the illegality of the transaction, and that the loss was incurred by capture by British ship after hostilities had commenced. The Lord Chancellor says: "The consequence of permitting such an assurance would be, that it would be a complete indemnity against capture, either by His Majesty's ships or private ships authorised by letter of Marque to make prizes; and the loss would fall upon British subjects."

In *Porter* v. *Freudenberg* (2) the decision of Bailhache J. in *Robinson & Co.* v. *Continental Insurance Co. of Mannheim* (3) was approved, and it was held that there was a locus standi in judicio for an enemy alien defendant against whom an action had been brought.

In that judgment of the Court of Appeal the distinction between an enemy alien plaintiff and an enemy alien defendant is based on public policy, and the lack of any consideration of public policy which would justify preventing the enforcement by a British or neutral subject of a right against an enemy alien. In the present case the question which arises is not dissimilar, and the distinction between making the enemy alien a plaintiff or defendant is in some cases little more than one of form. I cannot see that there is any ground on public policy for depriving British subjects of their right of access

(1) (1806) 13 Ves. 64. (2) [1915] 1 K. B. 857.
(3) [1915] 1 K. B. 155.

to the Courts, and preventing the enforcement of their claims, however small may be the possible contingent interest of an alien enemy who was in partnership with them prior to the outbreak of the war, and to whom no payment can be made so long as the war lasts.

It would be superfluous to re-examine the cases collected in *Porter* v. *Freudenberg* (1), but in many of them the disability to sue is referable not to the status of the party but to the illegality of the contract, and the decision is given on this ground.

In *Cornu* v. *Blackburne* (2) an action of assumpsit was brought on a ransom bond. Lord Mansfield gave the judgment of the Court in favour of the plaintiff. "It is sound policy, as well as good morality, to keep faith with an enemy in time of war. This is a contract which arises out of a state of hostility, and is to be governed by the law of nations, and the eternal rules of justice." Reference is made to the case of *Ricord* v. *Bettenham* (3) as notorious all over Europe; but it was pointed out in the subsequent case of *Brandon* v. *Nesbitt* (4) that the action was not brought until peace was restored. Subsequently the case of *Anthon* v. *Fisher* (5) came on for hearing. Lord Mansfield gave judgment in favour of the plaintiff, but there was a division of opinion, and a writ of error was brought. The judges of the Common Pleas and Exchequer were unanimous in holding that an enemy alien cannot sue for the recovery of a right "claimed to be acquired by him in actual war." The important point is that this decision was based on the illegality of the contract which it was sought to enforce. In *Brandon* v. *Nesbitt* (4) the same principle is applied to an insurance case, and Lord Kenyon in his judgment refers to *Anthon* v. *Fisher* (5), but Lord Ellenborough points out in *Flindt* v. *Waters* (6): "In *Brandon* v. *Nesbitt* (4) the party interested had become an alien enemy before the voyage insured was performed and the loss had happened," and Bayley J. added, "that in *Brandon* v. *Nesbitt* (4) the voyage insured was illegal." Much reliance

(1) [1915] 1 K. B. 857.
(2) 2 Doug. 641, 648.
(3) 3 Burr. 1734.
(4) 6 T. R. 23.
(5) 2 Doug. 649n.
(6) 15 East, 260, 265.

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was placed, in the argument of the appellant's counsel, on the well-known decision in *The Hoop* (1), in which it was decided that British subjects were not at liberty to trade with the enemy without the King's licence, and that all property taken under such a trade is confiscable as prize to the captor. This, again, was a case of an illegal transaction, and it was said that to such transactions the law gives no sanction; they have no legal existence, and the whole of such commerce is attempted without its protection and against its authority.

My Lords, I think it is open to this House to consider whether the rule of law against the right of access to the Courts by enemy aliens is so inflexible as to prevent access by British subjects when, in order to properly constitute their action, it is necessary that a former partner, who is an enemy alien, should be joined either as co-plaintiff or defendant. The relevant facts may be shortly summarised. The banking business of the partnership, as it existed prior to the outbreak of the war, was established in the City of London. It has always been carried on in the City of London, and not elsewhere. The firm for a long time past had been constituted by annual deeds of partnership, which gave the partners in this country ample authority to take legal proceedings. At the outbreak of the war the enemy partner had a one-fortieth share in the partnership, and was indebted to the firm in the sum of more than 30,000*l.*, and in November, 1915, the firm rendered to the Public Trustee, as custodians for England and Wales, a return of the particulars of the debt due from the enemy partner, which then amounted to about 30,500*l.* Pursuant to leave obtained, the respondents issued a writ against the appellant, which was specially endorsed for the sum of 29,772*l.* 9*s.* The writ was duly served on the appellant at Buenos Aires in April, 1916. The appellant did not enter an appearance, and accordingly the respondents signed judgment against him in default of appearance, and subsequently obtained a charging order nisi on certain shares belonging to the appellant in a company called the Paraguay

(1) 1 C. Rob. 196.

Central Railway Company. Thereupon the appellant made application to set aside the judgment and also the application made by the respondents for a charging order. The learned Master held that since the cause of action accrued a member of the firm had become an alien enemy, and that the action was not, by the law of England, maintainable during the continuance of the war; and he also made orders discharging the charging order nisi, and dismissing an application for the appointment of a receiver by way of equitable execution. These orders were confirmed by Peterson J. sitting as Vacation Judge in Chambers, but set aside by the judgment of the Court of Appeal. No question of partnership law is involved in the appeal, but, as stated by Sargant J., in substance the recovery of the debt for the partnership would be as much a recovery for the benefit of an English trading unit, and primarily of their creditors, as if the partners had constituted an English limited company one-fortieth of the share capital of which belonged to the enemy alien. It follows, therefore, that if the principle for which the appellant contends is maintainable, then any contingent interest in a former partner, however small in partnership property, who by the outbreak of war has become an enemy alien, though such property is applicable primarily in discharge of the debts of the partnership, and might be all required for this purpose, would deprive British subjects of all right to recover by legal process debts due to the partnership during the period of war, however large the interests of the British subjects may be, and even though it may be certain that such debts will become irrecoverable, to the detriment of British creditors, unless immediate steps can be taken to enforce their collection. In my opinion there is no absolute rule of law which prohibits the use of the name of an alien enemy, who has been a partner with British subjects prior to the outbreak of war, when it is necessary to enforce the payment of debts to which persons had become liable in lawful transactions, when the real object is either to meet the claims of British creditors, or to protect the interests of the British partners. To hold the contrary would be to deprive British subjects, or neutral

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aliens, of rights which have been held the necessary concomitant of lawful commercial transactions.

It is not alleged that the action was brought without authority, or that it was necessary to approach the alien enemy in order to obtain his concurrence or assent. On this point the articles of partnership seem to be conclusive. There may be a question whether the alien enemy would not more properly have been joined as a defendant (*Cullen* v. *Knowles* (1)) than as a plaintiff; but this is not the objection which was really taken. I see no reason why this form of procedure should not have been followed. I agree, however, with the opinion expressed by Bankes L.J., that this objection, to be entertained, should have been taken at an earlier stage, when it might have been met by amendment. It was further argued that any inconvenience which might result from the inability of British subjects to recover debts due to a partnership dissolved by outbreak of war has been remedied under the Acts passed to regulate trading with the enemy. No doubt these Acts provide additional facilities in procedure, but they do not affect the general rule of law or the principles which determine the right of access to the tribunals.

The present appeal does not involve the question of the ultimate destination or payment of the funds sought to be recovered, but such funds cannot, under any circumstances, be paid over to an enemy alien during the period of war, and any decision which your Lordships give does not affect this fundamental principle. This distinction is clearly stated by Lord Parker in the *Daimler* case (2): "It was suggested in argument that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was over. I entirely dissent from this view. I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of the profits of such trading. I see no reason why the trustee of an English business with enemy cestuis que trust should not during the war continue to carry on the business, although after the war

(1) [1898] 2 Q. B. 380. (2) [1916] 2 A. C. 307, 347.

the profits may go to persons who are now enemies, or why moneys belonging to an enemy but in the hands of a trustee in this country should not be paid into court and invested in Government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. . . . . The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war, and not the possible advantage he may gain when peace comes." If a trustee of an English business with enemy cestuis que trust should during the war continue to carry on the business, it appears to be essential that such trustee should have a right of access to the tribunals; but it is not necessary in the present case to say more than that in the liquidation of a partnership the English partners in whom is vested a power to bring actions should not be disentitled by the rule of procedure that it is necessary to join an enemy alien as a party in order that the action may be properly constituted.

My Lords, there have been recent cases in which a question has been raised similar to that which is now in debate, and on which learned judges have expressed differing opinions.

Warrington J., in *Mercedes Daimler Motor Co. and Daimler Motoren Gesellschaft* v. *Maudslay Motor Co.* (1) and Lush J. in *Rombach* v. *Gent* (2) have given decisions in substantial accord with those of Bankes L.J. and Sargant J. In *Mercedes Daimler Motor Co. and Daimler Motoren Gesellschaft* v. *Maudslay Motor Co.* (1) a patent had been vested jointly in the plaintiffs, an English company and a German company, but the English company had the sole right of bringing actions for infringement, and might join the German company as co-plaintiffs. The English company did bring an action for infringement, joining as co-plaintiffs the German company. Warrington J. held that as the English company had the sole right to bring the action, the fact that the German company was an alien enemy was not a ground for suspending the

(1) 31 Times L. R. 178. (2) 31 Times L. R. 492.

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action, and that to deny the English company the right to prosecute the action would be to deny the right of a British subject to bring an action for his own protection. In *Rombach* v. *Gent* (1) a partnership firm consisting of three partners, of whom one was an enemy alien resident in Germany, sold goods to the defendants. One of the other partners brought an action for dissolution of partnership, and was appointed receiver. Lush J. held that an action was maintainable by the receiver to recover the price of goods sold by the partnership. "It was true that he" (the receiver) "had had to join his two partners, but it was the receiver's action in substance, and it was impossible to say that it was brought for the benefit of a firm one of whom was an alien enemy." Sargant J., in expressing his agreement in the judgment of Lush J., said: "that a contrary decision would paralyse the liquidation, even with the aid of the Chancery Division, of partnership with alien enemies dissolved by the war." In the case of *Candilis & Sons* v. *Victor & Co.* (2) the action was brought in the name of a firm consisting of one British and two enemy alien partners. The action came on for trial, and a summons was taken out for a stay of proceedings, on the ground that two of the members of the firm were alien enemies. It is unnecessary to consider whether this case was binding on the Court of Appeal, but Bankes L.J., who was a party to that judgment, was also a party to the judgment under appeal.

My Lords, in the result I agree with the judgment of the majority in the Court of Appeal, and in my opinion the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, August 2, 1918.

Solicitors for appellant: *Richard Furber & Son.*

Solicitors for respondents: *Bircham & Co.*

(1) 31 Times L. R. 492.

(2) 33 Times L. R. 20.

[HOUSE OF LORDS.]

DEMETRIUS EMMANUEL CASDAGLI . . . APPELLANT; H.L. (E.)*

AND

1918

October 28.

JEANNE CASDAGLI . . . . . RESPONDENT.

Divorce — Jurisdiction — Domicil — Residence in Egypt — British protected Subject — Extra-territoriality.

There is no rule of law that a British resident in Egypt, who is registered as a British subject at the British Consulate, and as a consequence enjoys certain privileges and immunities by reason of the ex-territorial jurisdiction exercised by His Majesty in that country, cannot acquire an Egyptian domicil.

Where, therefore, a British subject, having his domicil of origin in England, migrated to Egypt and resided there as a British protected subject, and married in Egypt, and had since made his permanent home there without any intention of returning to England:—

Held, that he had acquired an Egyptian domicil, and, consequently, that the English Court had no jurisdiction to entertain a suit by his wife for dissolution of marriage.

Opinion of Chitty J. in *In re Tootal's Trusts* (1882) 23 Ch. D. 532 and dictum of Lord Watson in *Abd-ul-Messih* v. *Farra* (1888) 13 App. Cas. 431, 445 overruled.

Decision of the Court of Appeal [1918] P. 89 reversed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Horridge J.

In March, 1916, the respondent presented a petition for dissolution of her marriage with her husband, the appellant.

The appellant, who was a British subject born in England, by an act on petition, prayed that the petition should be dismissed, on the ground that he was domiciled in Egypt, and that consequently the High Court had no jurisdiction to entertain a suit for dissolution of the marriage. The respondent, by her answer, alleged that the appellant had never abandoned his English domicil.

The facts, which are fully set out in the report of the case

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD PHILLIMORE.

(1) [1918] P. 89.

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in the Court of Appeal and in the judgment of the Lord Chancellor, may be shortly summarized as follows.

The appellant was born in England in 1872. In 1895, when he was 23 years of age, he went to reside in Egypt, and had resided there ever since, first at Alexandria and afterwards at Cairo. The appellant and respondent were married at Alexandria on July 1, 1905, according to the rites of the Orthodox Greek Church, of which they were both members, and subsequently on July 5, 1905, by a civil marriage at the British Consulate.

The appellant had at all times been registered at the British Consulate as a British subject.

The Consular Courts in Egypt exercise jurisdiction in matters relating to the personal status of British subjects resident in that country, and registered as such; but dissolution of marriage is excepted from their jurisdiction.

Upon these facts the appellant contended that he had acquired a domicil of choice in Egypt. The respondent contended that it was not legally possible for the appellant to acquire such a domicil, inasmuch as he resided there as a privileged member of an ex-territorial community.

Horridge J. found that the appellant had voluntarily fixed his residence in Egypt with an intention of remaining there for an unlimited time, but held, upon the authority of *In re Tootal's Trusts* (1) and *Abd-ul-Messih* v. *Farra* (2), that the appellant's residence in Egypt was ineffectual to create an Egyptian domicil of choice, and that his domicil of origin remained. He therefore dismissed the act on petition.

The Court of Appeal, by a majority (Swinfen Eady and Warrington L.JJ., Scrutton L.J. dissenting), affirmed this decision.

1918. July 25, 26, 29, 30. *George Wallace K.C.* and *J. Harvey Murphy* for the appellant. The question is whether there is any rule of law which prevents a British subject from acquiring a domicil in Egypt by reason of the ex-territorial

(1) 23 Ch. D. 532. (2) 13 App. Cas. 431.

jurisdiction exercised by Great Britain in that country. The majority of the Court of Appeal have held that the appellant, a British subject, registered as such at the British Consulate in Egypt, inasmuch as in matters relating to personal status he is subject to the jurisdiction of the Consular Courts, which derive their authority from the capitulations made between Great Britain and the Sultan and confirmed by the Treaty of the Dardanelles in 1809, is a member of a privileged community, living under English law on Egyptian soil, and is legally incapable of acquiring a domicil of choice in that country, and they have treated the case as concluded by *In re Tootal's Trusts* (1) and *Abd-ul-Messih* v. *Farra*. (2) In *In re Tootal's Trusts* (1) a claim for succession duty against the estate of an Englishman permanently resident in Shanghai was resisted on the ground that the testator had acquired an Anglo-Chinese domicil. It was admitted by counsel for the personal representatives of the testator that they could not contend for a Chinese domicil, but the admission, and its approval by the learned judge, were based upon a misapprehension or misapplication of the principles laid down by Sir William Scott in *The Indian Chief* (3) and by Dr. Lushington in *Maltass* v. *Maltass*. (4) *The Indian Chief* (5) was decided upon a question of commercial domicil, and it was there held that such domicil was derived from community and not from locality. But commercial domicil is wholly distinct from civil domicil, and different considerations apply to it. That case, therefore, has no application. In *Maltass* v. *Maltass* (4) Dr. Lushington, who appears to have misapprehended the effect of Sir W. Scott's judgment in *The Indian Chief* (5), decided no question of domicil and expressed no opinion as to the legal capacity of a British subject to acquire a domicil in Turkey; but he thought there was every presumption against the intention of British Christian subjects voluntarily becoming domiciled in the Dominions of the Porte by reason of the difference of religion, customs, and habits. Those observations go to evidence

(1) 23 Ch. D. 532.
(2) 13 App. Cas. 431.
(3) (1801) 3 C. Rob. 12, 22, 28-30.
(4) (1844) 1 Rob. Eccl. 67, 80, 81.
(5) 3 C. Rob. 22.

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only, and they do not apply with the same force to Egypt at the present day. Assuming that the admission in *In re Tootal's Trusts* (1) was well founded, the appellant accepts the decision of Chitty J. that domicil arises from locality and not from connection with a community, and that the testator's membership of the English community at Shanghai conferred no Anglo-Chinese domicil; but the decision proceeded upon a false admission, and is wrong in fact and in law.

In *Abd-ul-Messih* v. *Farra* (2) the question was whether the administration of the estate of an Ottoman subject, who had taken up his permanent residence at Cairo under British protection, was to be governed by Turkish or by English law.

Lord Watson, delivering the judgment of the Privy Council, decided that the deceased's domicil was in Cairo, and that Turkish law applied. He rejected the contention that the deceased's selection of a permanent abode in Cairo under British protection attracted to him an Anglo-Egyptian domicil, and held that there could be no such thing as a domicil independent of locality and arising simply from membership of a privileged society. That decision the appellant accepts and relies upon, but he takes exception to certain obiter dicta of Lord Watson.

His Lordship's description of the position of foreigners resident in Egypt under British protection is, at the present time at any rate, incorrect. They are amenable to the jurisdiction of the Mixed Courts, which were created by the Khedive in 1875, and which are composed of judges, partly foreigners and partly natives, appointed by the Egyptian Government, and they are also to some extent amenable to the Egyptian local Courts. Moreover, the Consular Courts are constituted by permission of the Egyptian Sovereign, and are to be regarded as Egyptian Courts deriving their authority from the Sovereign of that country. So that the law administered by those Courts is, in truth, part of the municipal law of Egypt. See Blackstone, vol. 1, pp. 43-46. They are not independent of the Egyptian Courts nor are

(1) 23 Ch. D. 532. (2) 13 App. Cas. 431, 445.

they immune from taxation: Scott's Law affecting Foreigners in Egypt as the Result of the Capitulations.

Lord Watson further said that "residence in a foreign State, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere is ineffectual to create a new domicil of choice." It is submitted that that dictum of Lord Watson, which was not necessary to the decision of the case, and the opinion of Chitty J. in *In re Tootal's Trusts* (1), are erroneous and ought to be overruled. It is objected that *In re Tootal's Trusts* (1) has remained unquestioned for so long that it ought not now to be disturbed, but it has never been acquiesced in by the profession. It has been criticized by text writers of authority: Westlake's Private International Law, 5th ed., pp. 336-349; Dicey's Conflict of Laws, 2nd ed., p. 724n.; Piggott on Ex-territoriality, 1907 ed., p. 217; and in *Mather* v. *Cunningham* (2) the Supreme Judicial Court of Maine refused to follow it. See also *The Eumaeus*. (3) Domicil depends on locality and not upon society; it is not affected by the fact that a man has joined any particular society. The test of domicil is residence in a locality coupled with an intention to reside for an indefinite time.

Swinfen Eady L.J. was in error in regarding it as essential to the acquisition of a domicil in a foreign country that the person residing there should adopt the manner of life and identify himself with the customs of the native inhabitants. It is suggested that a domicil may be acquired in a barbarous country, though the point has never been decided, and that barbarism is only material as evidence with reference to the presumed intention of the person sojourning in that country. The appellant's argument is contained in the judgment of Scrutton L.J. It is settled that the jurisdiction of the Court in the matter of divorce depends upon the matrimonial domicil; therefore the High Court has no jurisdiction to entertain the respondent's suit.

(1) 23 Ch. D. 532. (2) (1909) 105 Maine, 326; 74 Atlantic Rep. 809.
(3) (1915) 1 Br. & Col. P. C. 605, 615.

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They also referred to *Le Mesurier* v. *Le Mesurier* (1); *Bater* v. *Bater* (2); *In re Craignish* (3); *In re Patience* (4); *Bell* v. *Kennedy* (5); *Udny* v. *Udny* (6); *Walker* v. *Baird* (7); *Jopp* v. *Wood* (8); *Ex parte Cunningham* (9); *Cockrell* v. *Cockrell* (10); *Bremer* v. *Freeman* (11); *Douglas* v. *Douglas* (12); *Haldane* v. *Eckford* (13); *In re Steer* (14); *Winans* v. *Attorney-General.* (15)

Hume Williams K.C. and *Patrick Hastings* for the respondent. In *Abd-ul-Messih* v. *Farra* (16) Lord Watson, after adopting the dictum of Lord Westbury in *Udny* v. *Udny* (17) that "domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time," says, "According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity." He then lays down that the law which regulates the man's personal status must be that of the governing power in whose dominions he resides; and he goes on to say that "residence in a foreign country, without subjection to its municipal laws and customs, is therefore ineffectual to create a new domicil"; and he approves *In re Tootal's Trusts.* (18)

Lord Watson's language is precise in its terms. It is a carefully considered summary of the law on the subject, and it is conclusive, as was recognized by Chitty J. in *Abdallah* v. *Rickards.* (19)

Not only has the law been definitely settled by *In re Tootal's Trusts* (20) and *Abd-ul-Messih* v. *Farra* (21), but it has since

(1) [1895] A. C. 517.
(2) [1906] P. 209.
(3) [1892] 3 Ch. 180
(4) (1885) 29 Ch. D. 976.
(5) (1868) L. R. 1 H. L. Sc. 307.
(6) (1869) L. R. 1 H. L. Sc. 441.
(7) [1892] A. C. 491.
(8) (1865) 4 D. J. & S. 616, 623.
(9) (1884) 13 Q. B. D. 418.
(10) (1856) 25 L. J. (Ch.) 730.
(11) (1857) 10 Moo. P. C. 306.
(12) (1871) L. R. 12 Eq. 617.
(13) (1869) L. R. 8 Eq. 631.
(14) (1858) 3 H. & N. 594.
(15) [1904] A. C. 287.
(16) 13 App. Cas. 431, 439.
(17) L. R. 1 H. L. Sc. 320.
(18) 23 Ch. D. 532.
(19) (1888) 4 Times L. R. 622.
(20) 23 Ch. D. 532.
(21) 13 App. Cas. 431.

been universally acted on: *The Derfflinger* (*No.* 1) (1); *The Lutzow* (2); Dicey's Conflict of Laws, 2nd ed., pp. 91, 724. If a man carries with him into the country where he intends to reside part of the laws of his own country, and enjoys immunity from the laws of the new country, he cannot, by permanent residence, acquire a domicil of choice in that country. It follows that a British subject cannot acquire a domicil in Egypt so as to determine his domicil of origin.

They also referred to *Imperial Japanese Government* v. *Peninsular and Oriental Steam Navigation Co.* (3)

George Wallace K.C. replied.

The House took time for consideration.

October 28. LORD FINLAY L.C. My Lords, this appeal arises out of proceedings for divorce taken in the Divorce Court in England by the wife, the respondent in this appeal, against her husband, the appellant. The husband, by Act on Petition, alleged that he had acquired a domicil of choice in Egypt, that there was no English domicil, and that the English Court had no jurisdiction to entertain a suit against him for dissolution of marriage. The wife, by her answer, set up that the husband had never abandoned his domicil of origin, which was English, and that the Court, therefore, had jurisdiction. Evidence was taken orally and upon affidavit. The case was tried before Horridge J. He held that he was bound by authority to decide that a British subject, registered as such at the British Consulate, could not, in point of law, acquire a domicil in Egypt, and his decision was affirmed by the majority of the Court of Appeal (Swinfen Eady L.J. and Warrington L.J.), while Scrutton L.J. dissented, holding that there was no rule of law against the acquisition of a domicil in Egypt by a British subject. From the decision of the Court of Appeal the present appeal is now brought to your Lordships' House. The facts are not in dispute, and the only question is whether it is, in point of law, impossible for a registered British subject to acquire

(1) (1916) 1 Br. & Col. P. C. 386. (2) (1915) 1 Br. & Col. P. C. 528.
(3) [1895] A. C. 644, 654, 656.

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a domicil in Egypt. It was contended for the respondent that this point had been decided in her favour by Chitty J. in *In re Tootal's Trusts* (1) and by the Judicial Committee in *Abd-ul-Messih* v. *Farra* (2), and that these cases had been correctly decided and ought to be followed by your Lordships' House.

It is admitted that the appellant is, and always has been, a British subject. He was born in England in 1872, his father being a naturalised British subject residing in England, and carrying on business there and in Egypt. The appellant was taken to Egypt in 1879 on account of his health, and remained there until 1882, when he returned to England. He was educated in England and in France, and returned to Egypt in 1895 when he was 23 years of age. He resided in Alexandria from 1895 to 1900, and was engaged in his father's business there. In 1900 he went to Cairo to manage the business in Cairo, and has resided in Cairo from that time until the present. He always has been, and is, a member of the Greek Orthodox Church, and the respondent, who was born in Egypt, is a member of the same Church. They were married according to the rites of their Church in Alexandria on July 1, 1905, and on the 5th of the same month the civil marriage took place at the British Consulate at Alexandria. The appellant was taken into partnership by his father, together with the appellant's four brothers, in 1910. The father died in 1911, and since his death the appellant has carried on the Egyptian branch of the business along with two of his brothers. The appellant has been, and is, registered as a British subject at the British Consulate at Cairo. Horridge J. found that the appellant had fixed his residence in Egypt with the intention of residing there for an unlimited time. He decided against the husband on the question of jurisdiction, not at all upon the facts as to residence, but simply on the ground that, in point of law, it was impossible for a British subject to acquire a domicil in Egypt on account of the extra-territorial rights which British subjects there enjoy. The same view was taken by the majority of the Court of Appeal.

(1) 23 Ch. D. 532. (2) 13 App. Cas. 431.

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Until December, 1914, Egypt was, in the contemplation of law, a part of the Ottoman dominions; but in that month the suzerainty of the Sultan of Turkey was terminated, and Egypt became a Sultanate under the protection of Great Britain. The capitulations which had long governed the position in Egypt of the subjects of Great Britain and of other European Powers remain in force at the present time. These capitulations are a series of treaties with the several European Powers. The capitulations between Great Britain and the Sultan of Turkey were confirmed by the Treaty of the Dardanelles in 1809, and by s. 16 of that Treaty it was provided that disputes amongst the English themselves should be decided by their own magistrate or consul according to their customs, without interference by the Turkish authorities. Consular Courts were accordingly established for the decision of such disputes between English subjects, not relating to land, and such Courts are now regulated in Egypt by the Egypt Order in Council of His Majesty dated February 16, 1915. By that Order the jurisdiction of the Consular Courts, which had been established by His Majesty in Egypt under the Capitulations, was continued. These Courts deal with disputes, not relating to land, the parties to which are all British subjects, and all questions affecting the personal status of a British subject must be determined in the Consular Courts. There are also in Egypt what are termed Mixed Courts, for the purpose of dealing with disputes between foreigners of different nationalities, or between foreigners and natives of Egypt. These Mixed Courts were established by the Khedive in 1875, after negotiations with the European Powers. They are Egyptian Courts which administer the law promulgated formerly by the Khedive, and since December, 1914, by the Sultan of Egypt. The Courts of first instance consist of seven judges—4 foreigners and 3 Egyptian—while the Court of Appeal consists of 11 judges—7 foreigners and 4 Egyptian. The judges are appointed by the Egyptian Government after communication, in the case of foreigners, with the Government of the country to which they belong. These Courts have criminal jurisdiction

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over foreigners in the matters enumerated in the Réglement d'Organisation Judiciaire pour les procès mixtes, and have civil jurisdiction over all civil and commercial disputes between Egyptians and foreigners and between foreigners of different nationalities not relating to the law of personal status. They have also exclusive jurisdiction in actions relating to immovable property to which foreigners are parties. The jurisdiction of the Mixed Courts in these matters is defined by art. 9 of Titre I. of the Réglement, "Ces tribunaux connaîtront seuls des contestations en matière civile et commerciale entre indigènes et étrangers et entre étrangers de nationalités différentes, en dehors du statut personnel. Ils connaîtront seulement des actions réelles immobilières entre indigènes et étrangers ou entre étrangers de même nationalité ou de nationalités différentes." (1) It is, therefore, clear that foreigners residing in Egypt are subject to the law of Egypt and to Egyptian Courts, with exceptions in the case of disputes all the parties to which are of the same nationality or which relate to the law of personal status.

The Turkish Government had been in the habit of exacting tribute in the form of capitation tax from unbelievers permitted to reside in Ottoman territory. By the Capitulations British subjects were exempted from this tribute. During the argument, your Lordships were referred to Mr. J. H. Scott's work on the law affecting foreigners in Egypt (revised edition), in which, at page 171 and the following pages, the question of taxation as affecting foreigners in Egypt, is discussed. The learned author, in summing up the law on this point, says (at p. 172): "As a matter of fact no tax of any importance exists at the present time in Egypt which is not paid by foreigners as much as by natives." The land tax is payable by foreigners under the law of 1867, and would appear to have been payable by custom before that date, and the house tax is also payable by foreigners (pp. 173, 174). Custom dues are payable by

(1) The latest recension of these regulations may be found in the Codes des tribunaux mixtes d'Egypte, ed. 1917, cp. the Code de procédure civile et commerciale, 1917, art. 98. The variations are not material for any purpose of the present report.—H. B. H.

foreigners (p. 173). All these matters have formed the subject of agreement between the various Powers and the Government of Egypt, and it has been held by the Mixed Tribunals that no tax can be imposed upon foreigners without the consent of their own Government.

The Consular jurisdiction over British subjects in Egypt is exercised under the Order in Council of November 7, 1910, modified as regards Egypt by the Egypt Order in Council of February 6, 1915, which was made after the renunciation of allegiance to Turkey and the constitution of Egypt as a separate Sultanate under British protection. There is a Supreme Consular Court sitting at Alexandria, and Provincial Courts are provided for by art. 17 of the Order in Council. The Court has jurisdiction over British subjects in Egypt and any property there of any British subject, as also in respect of British ships within its limits. It has also jurisdiction in certain special cases with regard to Ottoman subjects and foreigners with the consent of their Government. Its jurisdiction is in matters criminal and matters civil. The article which is most directly relevant to the present proceedings is art. 103 of the Order in Council of 1910, which runs as follows: "The Supreme Court shall as far as circumstances admit have for and within the Ottoman Dominions with respect to British subjects all such jurisdiction in matrimonial cases, except the jurisdiction relative to dissolution or nullity or jactitation of marriage, as for the time being belongs to the High Court in England." It follows that the marriage between the appellant and the respondent could not be dissolved by the Consular Court. It was urged upon us that this pointed to the inference that the Divorce Court in England must have jurisdiction, as otherwise the wife would be unable to obtain anywhere the relief to which she alleges she is entitled. It is, however, well settled that the jurisdiction of the Divorce Court depends upon domicil. If the husband's domicil be English he or his wife may sue for a divorce in the English Court. If the domicil is not English jurisdiction will not be conferred by the fact that the relief cannot be obtained in the Consular

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Court. The fact that the acquisition by a British subject of an Egyptian domicil would make it impossible to get relief by way of divorce has no bearing on the question of law whether such a domicil can be obtained by him in point of law; it might conceivably in some cases form an element for consideration in inquiring whether he had the intention to acquire a domicil in Egypt.

The present case, therefore, depends upon the question whether the husband has an Egyptian or an English domicil. Upon the evidence, and according to the findings of the Courts below, the husband has done everything possible to acquire an Egyptian domicil, and this he had acquired unless, as a matter of law, it be impossible for a British subject in his position to acquire such a domicil. It was argued that British subjects in Egypt enjoy ex-territoriality, and that this prevents the acquisition of Egyptian domicil. This argument appears to me to rest upon a misconception as to the position of a British subject in Egypt. His position is in no respect analogous to that of an ambassador and his staff in a foreign country. He is subject to the law of Egypt as administered by the Mixed Tribunals, and pays taxes. It is true that on a criminal charge, not being one of those enumerated in the law as to Mixed Tribunals, he must be tried in His Majesty's Consular Court, and civil disputes between him and other British subjects and questions as to his personal status and succession must be there determined. The jurisdiction exercised by His Majesty in Egypt is indeed extra-territorial, but it is exercised with the consent of the Egyptian Government, and its jurisdiction is therefore, for this purpose, really part of the law of Egypt affecting foreigners there resident. The position of a British subject in Egypt is not extra-territorial; if resident there, he is subject to the law applicable to persons of his nationality. Whether that law owes its existence simply to the decree of the Government of Egypt or to the exercise by His Majesty of the powers conferred on him by treaty is immaterial.

It has often been pointed out that there is a presumption against the acquisition by a British subject of a domicil

in such countries as China and the Ottoman dominions, owing to the difference of law, usages, and manners. Before special provision was made in the case of foreigners resident in such countries for the application to their property of their own law of succession, for their trial on criminal charges by Courts which will command their confidence, and for the settlement of disputes between them and others of the same nationality by such Courts, the presumption against the acquisition of a domicil in such a country might be regarded as overwhelming unless under very special circumstances. But since special provision for the protection of foreigners in such countries has been made, the strength of the presumption against the acquisition of a domicil there is very much diminished. Egypt affords a very good illustration of this. What presumption is there against the acquisition of an Egyptian domicil by a British subject when the country is under British protection and when the British subject is safeguarded in all his rights in the manner which I have described ? The question is one to be tried on the ordinary principles applicable to such questions of fact. The view that it is impossible in point of law could be supported only on the assumption that the doctrine of ex-territoriality applies to all British subjects, so that though actually in Egypt they are in contemplation of law still in their own country, and that for this reason there is not, and cannot be, the residence in the particular locality necessary for the acquisition of domicil. Any such view as to impossibility appears to be erroneous in principle, and inconsistent with the evidence in this case as to the position of a foreigner resident in Egypt. It is, however, necessary to examine the authorities which were strongly pressed upon us as showing that the point should be treated by this House as no longer open to discussion.

In the case of *The Indian Chief* (1) the question arose whether the owner of cargo, being an American citizen resident at Calcutta, should be treated as a British subject so as to render illegal his trading with the enemy. All that was

(1) 3 C. Rob. 22.

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decided in the case was that the nominal sovereignty of the Great Mogul might for this purpose be disregarded, and that the cargo-owner, as he resided and traded in Calcutta under the Government of the East India Company, must be treated as a British subject, and as he had traded with the enemy the cargo was condemned. The case was cited merely on account of the passage in Sir W. Scott's judgment (1), in which he explains, with even more than his wonted charm of expression, the position of foreign traders in Eastern countries. The passage illustrates the presumption against the acquisition of a domicil of choice in such Eastern countries, but is not otherwise relevant to the present discussion.

In 1844 the case of *Maltass* v. *Maltass* (2) came before Dr. Lushington sitting for Sir H. Jenner Fust in the Prerogative Court of Canterbury. The question was as to the law which should govern the will of a British subject who for many years had resided in Smyrna. Dr. Lushington found that the deceased was a British subject, and then proceeded to inquire whether he was domiciled in Smyrna, but pointed out that this inquiry would be superfluous if, with respect to his succession, the law of England and the law applicable in Turkey were the same. Referring to the provisions of the Capitulations that the property of British subjects dying in Turkey should be disposed of according to English law, he held that this applied even in cases in which the deceased had become domiciled in Turkey, and that it was immaterial whether he had acquired a domicil in Smyrna or retained his English domicil, as in either case the English law would apply. He concluded with the following observations: "I give no opinion, therefore, whether a British subject can or cannot acquire a Turkish domicil; but this I must say,—I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the Dominions of the Porte. As to British subjects, originally Mussulmen, as in the East Indies, or becoming Mussulmen, the same reasoning does not apply to them as Lord Stowell has said does apply in cases of a total and entire difference

(1) 3 C. Rob. 28–30. (2) 1 Rob. Eccl. 67, 80.

of religion, customs, and habits." The language of Dr. Lushington in this judgment lends no countenance to the idea that it is impossible for an English subject to acquire a domicil of choice in a country like Turkey. So far as he touches upon the question at all, he treats it not as a matter of law but as a question of fact.

In 1882 the case of *Tootal's Trusts* (1) was decided by Chitty J. In that case a petition was presented by residuary legatees asking for a declaration that the testator was domiciled at Shanghai at the time of his death, and consequently that no legacy duty was payable. The testator was a British subject who resided at Shanghai and died there. If the domicil was English the duty was payable, while if the deceased had acquired a domicil in China the duty was not payable. The testator had for some years before his death determined to reside permanently at Shanghai, and had formed and expressed the intention of never returning to England. It was admitted that it could not be contended that the domicil was Chinese. It is clear that what was meant by this admission was that it could not be contended that the testator had become domiciled in China so as to attract to his estate the law applicable in China to natives of that country, and Chitty J. said: "This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in *The Indian Chief* (2), and by Dr. Lushington in *Maltass* v. *Maltass*." (3) Both of these great judges had treated the question as one of fact, and had pointed out the improbability of the acquisition of such a domicil. It is obvious that the admission that there was no Chinese domicil in that sense was rightly made. What the petitioners contended for in *Tootal's Trusts* (1) was what is there called an Anglo-Chinese domicil. Some criticism has been bestowed upon this and analogous expressions,

(1) 23 Ch. D. 532, 534. (2) 3 C. Rob. 22, 29.
(3) 1 Rob. Eccl. 67, 80, 81.

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but it appears to me that the expression "Anglo-Chinese domicil" is apt to denote compendiously a domicil in China acquired by a British subject and carrying with it the privileges conferred by treaty upon British subjects there residing. These privileges appear to have been analogous to those enjoyed by British subjects residing in Egypt. (1) At p. 536 Chitty J. says that the exception from the jurisdiction of His Majesty's Supreme Court at Shanghai as a matrimonial Court in regard to dissolution, nullity, or jactitation of marriage, apparently left Englishmen subject to the jurisdiction of the Court for matrimonial causes in England in respect of such matters. This statement requires qualification. The absence of provision for divorce in Shanghai cannot of itself confer jurisdiction upon the English Court; it depends upon the question whether the domicil has remained English. If the English domicil has been replaced by an Anglo-Chinese one the jurisdiction of the English Courts would be gone.

Chitty J. went on to consider whether, on principle, an Anglo-Chinese domicil can be established. He came to the conclusion that "there is no such thing known to the law as an Anglo-Chinese domicil." (2) The view of Chitty J. was that the domicil alleged is in its nature extra-territorial. I cannot agree. The position of British subjects in such a country is not extra-territorial. The domicil is acquired and can be acquired only by residence in Egypt. The law applicable to the foreigner so residing is, by the consent of the Egyptian Government, partly Egyptian and partly English. This is the result of the Convention between the two Governments. Though the domicil is Egyptian, the law applicable to persons who have acquired such a domicil varies according to the nationality of the person. The foreigner does not become domiciled as a member of the English community in Egypt, but he acquires an Egyptian domicil because he, by his own choice, has made Egypt his permanent home, and you have then to consider by what code of law

(1) 23 Ch. D. 535, 536.

(2) 23 Ch. at p. 542 for the reasons given at pp. 538-9.

he and his estate are governed according to the law in force in Egypt. The domicil is purely territorial, and you go to the law in force in the territory to see what system of law it treats as applicable to resident foreigners and to what Courts they are subject.

Chitty J. refers to the case of British India, where there are many particular sects governed by particular laws applicable to them specially, and distinguishes it on the ground that these special laws are not laws of their own enactment, but are merely parts of the law of the governing community or supreme power. The supposed distinction does not exist. In Egypt it is part of the law of the governing community or supreme Power; in other words, it is part of the law of Egypt that English residents are governed by English law and that they are amenable in certain cases only to English Courts established by the King of England with the consent of the Egyptian Government. Chitty J. (1) puts the case of a citizen of the United States who attaches himself to the British community at Shanghai, and says that, according to the petitioner's argument, he would acquire an Anglo-Chinese domicil, and this he treats as a reductio ad absurdum of the petitioner's contention. A citizen of the United States resident permanently in Shanghai would be subject to the law which attaches to citizens of the United States so settling in China according to the law of China. His domicil and the law applicable would not arise from attaching himself to any particular community but from his personal residence in Shanghai coupled with his nationality. His having attached himself, whatever that may denote, to the English community would be immaterial unless he had acquired English nationality.

I think that the respondent's counsel were entitled to treat *In re Tootal's Trusts* (1) as a decision in their favour of the point now in dispute; and, indeed, I do not think that this was contested by Mr. Wallace. But the decision is, of course, not binding upon this House, and it is, in my opinion, erroneous. There has been no such general acquiescence

(1) 23 Ch. D. 539.

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in the correctness of the decision in *In re Tootal's Trusts*, and change of position in reliance upon that decision, as to render it improper that this House should act upon its own view of the law.

The case of *Abd-ul-Messih* v. *Farra* (1) came before the Judicial Committee of the Privy Council in 1887 on an appeal from the Supreme Consular Court at Constantinople. The question related to the succession to a person who had died in Egypt. The deceased was born at Baghdad, in the Ottoman dominions, of Ottoman parents, and in early life went to India, whence, after a considerable period, he went to Jedda, which was also in the dominions of the Porte. In 1858 he went to Cairo, where he remained until his death, under the protection of the British Government. Proceedings were taken in the Consular Court by his widow to obtain probate of his will, which was in the English form. The judge found that the testator died domiciled in the Ottoman Empire, that his domicil of origin was there, and that he was a member of the Chaldean Catholic community, and decreed that the law of Turkey governing the succession to a member of the Chaldean Catholic community in Ottoman dominions should be followed in distributing the effects of the deceased. From this order an appeal was brought by the widow to His Majesty in Council. In support of the appeal two arguments were put forward. First, that English law should apply to the succession of the deceased as a British protected person; and second, that the deceased was affiliated to the community of persons under English jurisdiction at Cairo, who formed as it were, an extra-territorial colony of the Crown, and that subjection to the jurisdiction of the Consular Court is equivalent to residence in the country to which these Courts belong, so as to establish a domicil in that country. The nature of these contentions must be borne in mind in order to appreciate the terms of the judgment. What the Judicial Committee decided was that the testator was not a British subject, and that the fact that he was a person under British

(1) 13 App. Cas. 431.

protection resident in Egypt did not render English law applicable to his succession.

The judgment was delivered by Lord Watson, who points out (1) that the idea of domicil, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicil to be found in the books. He goes on to say: "Their Lordships are satisfied that there is neither principle nor authority for holding that there is such a thing as domicil arising from society, and not from connection with a locality. *In re Tootal's Trusts* (2) is an authority directly in point, and their Lordships entirely concur in the reasoning by which Mr. Justice Chitty supported his decision in that case." I concur with the proposition that there is no such thing as domicil independent of locality. Residence in a particular locality is of the very essence of domicil, and the contention put forward by the appellant in *Abd-ul-Messih's Case* that subjection to the jurisdiction of the Consular Courts is equivalent to residence in the country to which these Courts belong, so as to establish domicil in that country, was preposterous. On the assumption that the deceased Abd-ul-Messih was domiciled in Egypt in virtue of permanent residence there, then if he had become in fact a British subject, the law applicable to British subjects resident in Egypt would have applied in his case. Mere association with the British in Egypt could not have that effect. If Chitty J. in *In re Tootal's Trusts* (2) had merely decided that there is no such thing as domicil arising from society, and not from connection with a locality, the decision would have been beyond criticism. It went, I think, a great deal further, and I find myself unable to agree with the judgment of Chitty J. in that case, or with Lord Watson's approval of his reasoning, an approval which was in no way necessary for the decision of the case before the Judicial Committee.

Lord Watson gives a statement as to the position of foreigners in Egypt in the following terms: "Certain privileges have been conceded by treaty to residents in Egypt,

(1) 13 App. Cas. 439 441. (2) 23 Ch. D. 532.

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whether subjects of the Queen or foreigners, whose names are duly inscribed in the register kept for that purpose at the British Consulate. They are amenable only to the jurisdiction of our Consular Courts in matters civil and criminal; and they enjoy immunity from territorial rule and taxation. They constitute a privileged society, living under English law, on Egyptian soil, and independent of Egyptian Courts and tax-gatherers." This description is not in accordance with the evidence in the case now before your Lordships, and I cannot help thinking that it is due to some misconception of the evidence in the *Abd-ul-Messih Case*. Foreigners residing in Egypt have, since 1875, been subject to the jurisdiction of Mixed Courts, which are Egyptian tribunals administering Egyptian law, and in certain cases to their own Consular Courts, and they are subject to Egyptian taxation. If the facts as to the position of foreigners in Egypt had been correctly appreciated it would have been impossible for the appellant to put forward the contention which Lord Watson summarizes as follows: "The appellant maintained that a community of that description ought, for all purposes of domicil, to be regarded as an ex-territorial colony of the Crown; and that permanent membership ought to carry with it the same civil consequences as permanent residence in England, or in one of the colonial possessions of Great Britain, where English law prevails."

The appellant in *Abd-ul-Messih's Case* appears also to have argued that the effect of the Order in Council was that English law is the sole criterion by which, in the case not only of British subjects, but also of persons under British protection resident in Egypt at the time of their decease, the capacity to make a will, and its validity when made, must be determined. This argument was dismissed, and rightly dismissed, by Lord Watson as wholly unsustainable on the construction of the Order in Council. (1) A further and alternative contention was advanced by the appellant's counsel in that case to the effect that the deceased had lost his Turkish nationality and had become a subject of the Queen. It

(1) 13 App. Cas. 441, 443.

is pointed out in the judgment, that it was clear that the deceased was not, in the sense of English law, a subject of Her Majesty, and that he did not possess that status within the meaning of the Order, which expressly enacts that it must be attained either by birth or naturalisation.

With reference to a contention that by an Order not appealed against the jurisdiction of the Consular Court had been sustained in respect of the "deceased having acquired the status of a protected British subject" (1), and that this was decisive that the deceased had acquired that status of a protected British subject, Lord Watson pointed out (2) that this expression does not occur in the order, and has no technical meaning, and that it must be understood as meaning merely that the deceased had de facto enjoyed the same measure of protection as that which is accorded by treaty to British subjects in the Dominions of the Porte. This, of course, is very different from his having become a British subject. The appellant, however, argued that in point of Turkish law the deceased would be regarded as a British subject, in virtue of the protection which he enjoyed. There was a conflict of evidence between the legal experts on this point, and the Judicial Committee did not think it necessary to decide what was the position of the deceased in this respect by the law of Turkey, for the reason stated in the following sentence of the judgment (3): "If it be assumed that, in consequence of his having placed himself under foreign protection, the Porte resigned the deceased, both civilly and politically, to the law of the protecting Power, that would merely give him the same rights as if his nationality had been English, and the territorial law of his domicil would still be applicable to his capacity to make a will, and to the distribution of his estate." It may be observed, however, that if his nationality had been, in fact, English, and his domicil was in Egypt, the English law would, for the reasons I have given in the earlier part of this judgment, have applied to his capacity to make a will and to the distribution of his

(1) 13 App. Cas. 436. (2) Ibid. 443-4.
(3) Ibid. 444.

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estate. The true justification for the course taken by the Judicial Committee in treating the opinion of the legal experts as to Turkish law as irrelevant is that the deceased was not, in point of English law, a British subject, and that it was quite immaterial whether the Porte had resigned the deceased to the Protecting Power unless that Power had accepted the resignation and treated the deceased as a British subject.

Having failed in the attempt to establish that the deceased was a British subject, the appellant asked to have a further proof for the purpose of showing that the Turkish Courts in administering the estate of a protected person in the position of the deceased would have been guided not by their own municipal law, but by the rules followed by English Courts in the case of domiciled Englishmen. Lord Watson points out that there was no suggestion on the Record that there was any special law in Turkey as to the succession of a protected person, and that no further proof upon this point could be allowed.

The last argument advanced by the appellant in the *Abd-ul-Messih Case* was that the deceased's residence in Cairo had conferred upon him an Egyptian, as distinct from a Turkish, domicil (1), but it is there pointed out that it had not been shown that a domicil in Egypt, so far as regards its civil consequences, differs in any respect from a domicil in other parts of the Ottoman Dominions. It is indeed obvious that the questions arising on an Egyptian domicil in 1880 would have been substantially the same as those arising upon a domicil, say, in Baghdad, where the deceased was born. Lord Watson added that residence in a foreign state as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice. This proposition is a restatement of what was said in the earlier part of the judgment (2), and for reasons which I have given in dealing with that passage I am unable to assent to it.

The decision in the *Abd-ul-Messih Case* was clearly right on the broad ground that the deceased was not a British subject,

(1) 13 App. Cas. 445. (2) Ibid. 438–441.

but I must with all respect express my dissent from some of the dicta which occur in the course of the judgment, for the reasons which I have given in referring to them. The correctness of the decision is in no way dependent upon these dicta.

The decision in the case of *In re Tootal's Trusts* (1) has been a good deal canvassed. Sir Samuel Evans, that very distinguished judge whose untimely death we all deplore, sitting in the Prize Court, made some observations with regard to *In re Tootal's Trusts* (1) which are worth quoting. In giving judgment in the case of *The Eumaeus*, November, 1915 (2), he said: "In this case I am not called upon to express any opinion upon the question whether at the present day a British subject can acquire a civil domicil in an Oriental country like China. *In re Tootal's Trusts*, (1) may or may not be good law. It has been much criticised by jurists, and has been recently dissented from in a judgment of the Supreme Judicial Court of Maine in *Mather* v. *Cunningham*. (3) The decision in the case now before the Court does not involve that question." In the case to which Sir Samuel Evans refers (*Mather* v. *Cunningham* (3)), as appears from the report in 74 Atlantic Reporter, the only report which I have seen, the Supreme Court of Maine, sitting as the Supreme Court of Probate, allowed an appeal from an order of the Probate Court in Waldo County appointing an administrator. The Court on the appeal consisted of Emery C.J. and five other Judges. The deceased had made his home and carried on his business at Shanghai, his domicil of origin having been in Waldo County, Maine, and the question on which the case turned was whether an American can as a matter of law acquire a domicil in the province of Shanghai where, by treaty, American law is substituted for the Chinese local laws. The Supreme Court made an elaborate examination of the case of *Tootal's Trusts* (1) and of many criticisms and comments which had been made on that decision, and arrived at the conclusion that its doctrine could not be supported. It was pointed out that domicil depends upon locality, and that the law of the locality attaches to the person who has acquired a domicil there,

(1) 23 Ch. D. 532.
(2) 1 Br. & Col. P. C. 605, 615.
(3) 105 Maine, 326; 74 Atlantic Rep. 809.

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whether that law be decreed by the Supreme Power of the foreign country or is the result of treaty. They say that the "whole trend of modern authority is in opposition to the dictum advanced in *In re Tootal's Trusts*." (1) The Court went on to refer to a case which had been decided at Shanghai in 1907, and said: "Judge Wiffley, the United States Court for China, sitting at Shanghai in 1907 in Re Probate of the will of Young J. Allen announced a strong opinion in which he rejects the dictum in *In re Tootal's Trusts*, and comes to a directly opposite conclusion." The Court in *Mather* v. *Cunningham* (2) gave its decision in the following terms: "The Court is of the opinion that Henry J. Cunningham, the decedent, at the time of his decease, had abandoned his domicil of origin in Waldo County, and had acquired a domicil of choice in Shanghai," and the appeal was sustained.

The case of *Allen's Will* is also cited by Mr. Westlake in his Private International Law, 5th ed., p. 349. Mr. Westlake says: "The testator's domicile of origin was in Georgia, and the question was whether the law of Georgia was to be applied in the administration of his estate, or 'the law which Congress has extended to Americans in China, which is the common law.' Judge Wiltley (3) decided for the latter, saying that 'We can see no good reason for holding that a citizen of the United States cannot be domiciled in China.'" I have made endeavours to get the pamphlet report of this case, but without success.

In March, 1916, in H.M. Court of Prize for Egypt sitting at Alexandria, Cator P. made the following observations in the case of *The Derfflinger* (*No.* 1) (4): "From time to time questions as to the status of British subjects in China and the Ottoman Dominions have come before our Courts, and it has been settled that no British subject can change his legal domicil, by residence in any place where the Crown has ex-territorial authority. That, as we know to our cost, owing to the great inconvenience which it has entailed upon the British community, is, I think, the effect of *In re Tootal's Trusts* (1),

(1) 23 Ch. D. 532.

(2) 105 Maine, 326; 74 Atlantic Rep. 809.

(3) The correct name is Wilfley.—H. B. H

(4) 3 Br. & Col. P. C. 389.

approved of by the Privy Council in *Abd-ul-Messih* v. *Farra*. (1) These decisions, it is true, relate only to the subtle and artificial doctrine of personal domicil which has been evolved by our civil Courts for the purpose of determining questions relating principally to probate and administration; and a legal domicil for the purpose of a Court of probate is, I need hardly say, a very different thing from a commercial domicil for the purpose of a Prize Court. But *In re Tootal's Trusts* (2) emphasises the fact that there still exist countries where, owing to fundamental differences in race and religion, Europeans do not merge in the general life of the native inhabitants, but keep themselves apart in separate communities; and where such separation is sanctioned by the exercise of extraterritorial authority I am of opinion that it is impossible for any individual to acquire a trade domicil other than that of the country to which he owes allegiance." The fact that inconvenience has resulted from a particular decision would of course be no reason for disturbing it, if sound in law. But, as in my opinion *Tootal's Case* and the dicta approving it are erroneous, I think that the British community in Egypt should be relieved from the inconvenience which Cator P. says has been thereby caused.

I entirely agree with the conclusion arrived at by Scrutton L.J. in his admirably reasoned judgment.

For these reasons I am of opinion that this Appeal should be allowed.

VISCOUNT HALDANE. My Lords, I agree as to the result of the appeal, and will not recapitulate the facts in the case. For it is quite clear that, while the Appellant had an English domicil of origin, he had migrated to Egypt in 1895, and had made his permanent home in Cairo with no intention of returning to England. Under these circumstances he must have acquired an Egyptian domicil if Egypt were a country where a domicil could be acquired, and he had done nothing to prevent its acquisition. But he remained a British subject, and he registered himself at the British Consulate at Cairo as a

(1) 13 App. Cas. 431. (2) 23 Ch. D. 532.

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member of the society of British subjects resident there. The question is whether such registration, with its consequences, prevented him from losing his English domicil of origin. Persons so registered undoubtedly acquire certain privileges, among which is that their litigations, disputes and differences, if among themselves, are settled by the British Consular Courts, and if between themselves and Egyptians or other foreigners are settled by the Mixed Tribunals established for the purpose. This was so for long before the war, and since the war the Sultan of Egypt has continued this privilege. But Egypt is a civilized country in which I have no doubt that a domicil could, apart from special obstacles, be acquired; and what we have to determine is whether membership of the society of British subjects who possess these privileges was an obstacle to the presumption of an Egyptian domicil of choice receiving effect.

I do not think that Chitty J. intended in *In re Tootal's Trusts* (1) to decide, as has been suggested to us, that it was impossible to acquire a domicil in the Chinese Empire. What I think he did intend to decide was that the institutions of that country were so radically divergent from those of this country as to raise a very strong presumption of fact against any intention to acquire such a domicil. In two passages of his judgment he uses words which indicate that he considered the point to be one of presumption of intention, and therefore a question of evidence and not of substantive law. Nor does it appear to me that the judgment of the Judicial Committee of the Privy Council in *Abd-ul-Messih* v. *Farra* (2) delivered by Lord Watson in 1888, on an appeal from the Supreme Consular Court of Constantinople, carries the matter any further in favour of the present Respondent. There a testator, whose domicil of origin was Turkish, and who was a member of the Chaldean Catholic community, fixed his permanent residence at Cairo, which was then part of the dominions of the Sultan of Turkey. He got himself registered as a member of the British community in Egypt, but only in the capacity of a protected person who enjoyed the measure of protection accorded primarily to British subjects but granted to all those

(1) 23 Ch. D. 532, 534, 538. (2) 13 App. Cas. 431.

who can obtain the inscription of their names in the register kept at the British Consulate in Egypt. It was held that he was not, in the sense of English law, a British subject. It was also held that he had not lost his Turkish domicil of origin, and that his residence as a privileged member of the community, although it might have been effectual to destroy a previous residential domicil elsewhere acquired by choice, was ineffectual to create a new domicil of choice. It was said, approving the decision in *In re Tootal's Trusts* (1), that there cannot be created a domicil arising merely from membership of such a community if there be not also such connection with the locality where the community is established as will attract the municipal law of the territory where the member of the community has settled, so that it becomes the measure of his personal capacity. The result was that the succession to the testator was treated as depending on the Turkish law applicable to the Chaldean Catholic community to which he belonged, a law which could apply in Egypt, which was then part of the Turkish dominion.

My Lords, all that these two cases decided was that mere membership of a protected British society in a foreign country is not enough to establish a domicil which would attract the British municipal law governing succession, unless it was accompanied by other essentials required in order to establish a British domicil. These essentials comprise settlement in a home on territory that is actually British, along with intention to make that home permanent. It is said to be difficult to find an adequate definition of domicil, and no doubt it is difficult. The reason is to be looked for in the older decisions in which the fundamental principle has been obscured by qualifications made in the earlier cases, in order to provide for residence occasioned by considerations of health, or of the anomalous conditions of service in India under the East India Company. Some obscurity existed at one time as to whether a change of allegiance was not also required in order to establish the acquisition of a new domicil, an obscurity which has now been removed. The effort to reconcile expressions used in

(1) 23 Ch. D. 532, 534, 538.

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numerous cases decided in these connections, cases which have never been overruled in terms, has embarrassed those who have attempted to find words which would cover everything of apparent authority which appears in the books. But it is clear to-day that there is no reason for hesitating to hold that a man who has shaken the dust of England from off his shoes, and has gone to reside in a civilized foreign country with the intention of making a new and permanent home there, gets rid of his English domicil of origin. Of course, the condition of that foreign country may be so barbarous as to make it so unlikely that he should have intended to make it his home, in the full sense of accepting its institutions as his own, that he may not have the intention to do so imputed to him. That happened in *In re Tootal's Trusts*. (1) But between China, at all events, as it was when Chitty J. gave the decision, and Egypt as it is to-day, there is a vast difference. At the time when the Respondent's Egyptian domicil was challenged Cairo had become a modern and civilized city situated in the country of a friendly Sultan. I do not think that even before the war there was anything short of a great divergence between the conditions in China at the period I have referred to and Cairo as it has been for many years. The divergence was quite enough to obviate the difficulty which Chitty J. encountered in ascribing intention. And I am therefore of opinion that there is no room for drawing in the present case the inference which Chitty J. made. The thing needful is not lacking in the facts with which we have to deal, and the Appeal ought to succeed.

LORD DUNEDIN (read by VISCOUNT HALDANE). My Lords, the practical question here is whether the Courts of England have or have not jurisdiction to dissolve the marriage of the appellant and respondent at the suit of the respondent. The appellant disputes the jurisdiction. Admittedly such jurisdiction is founded on the domicil of the husband. The appellant had an English domicil of origin, and is therefore subject to the jurisdiction unless he has abandoned that domicil which

(1) 23 Ch. D. 532.

he can only do by the acquisition of another domicil not English. Now the acquisition of another domicil depends on intention and the carrying into effect of that intention by residence. Intention may be (and in most cases is) gathered from what a person does, not merely from what he says. But it has been conceded throughout the argument that if the country here in question were any of the states of Western Europe or the United States of America instead of Egypt, the appellant has discharged the burden upon him; that is to say, has shown intention, and the carrying into effect of that intention by residence. The sole reason against the usual result following is that it is urged that in the case of Egypt, inasmuch as the appellant is registered at the British Consulate as a British subject, and in consequence is in the enjoyment of certain privileges as to his subjection to local tribunals, it is impossible for him to acquire an Egyptian domicil. My Lords, I think that proposition is neither laid down by authority nor sound on principle.

As to authority, the matter is reduced to two cases, *In re Tootal's Trusts* (1) and *Abd-ul-Messih.* (2) Neither of those cases is technically binding on your Lordships, but I will for the moment treat them as if they were so. I do not set forth the facts, as that has already been done by the noble Lords who preceded me. *In re Tootal's Trusts* (1) can be no authority for the proposition contended for, because all that it actually decided was that mere enrolment as a member of a British community in China, to which community certain privileges were by treaty conceded, did not per se create for the person so enrolled an Anglo-Chinese domicil. The fact that in that case Tootal had no Chinese domicil was based on admission, and therefore possibility had not to be considered. Apart from the actual decision I cannot say that I approve of the remarks of Chitty J. Nor am I able to follow the noble Viscount in thinking that all that he meant was that a Chinese domicil was such an improbable domicil for an Englishman to adopt that he would not easily be brought to think that it had been adopted. I think the American Court in *Mather's Case* (3) were right upon the

(1) 23 Ch. D. 532. (2) 13 App. Cas. 431.
(3) 105 Maine Rep. 326; 74 Atlantic Rep. 809.

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facts to refuse to follow what would seemingly have been Chitty J.'s opinion. Further, I am quite clear that the head-note in *Abd-ul-Messih* (1) goes too far in saying "*Tootal's Trusts* approved." The approval given by the Judicial Committee was as I read the judgment limited to the proposition—which indeed I think no one now disputes—that mere membership of a privileged community will not per se constitute domicil.

I turn to *Abd-ul-Messih*. (1) The first part of the judgment deals with the forlorn hope of showing that the proposition settled by *Tootal's Case* was wrong. And that was all that had been dealt with in the Court below. The de quo was the displacement of a Turkish domicil. It was said in the Court below, and it was all that was said, that this was effected by the acquisition of an English domicil. As Egypt where the residence took place was not England, this could only be if it were possible to acquire such a domicil by registration in the English community. Judgment on that point really disposed of the appeal. But at the last moment an argument seems to have occurred to counsel—to say that the Turkish domicil was displaced by an Egyptian domicil; and no doubt Lord Watson deals with that in his judgment. He says that the argument only made its appearance at the end of the case, and that there are two answers to it, either of which would be sufficient. First, that there was no averment that in the matter of succession (which was the practical point of the case) the law of an Egyptian domicil was different from that of a Turkish domicil. I agree that that was a sufficient answer. But he then goes on to say: "Residence in a foreign state, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice." This dictum, which was unnecessary for the decision of the case, and was therefore obiter, is really the sheet-anchor of the respondent's argument. Doubtless any dictum of Lord Watson is entitled to great respect. But there have been cases before this where the obiter dicta of the most learned

(1) 13 App. Cas. 431.

judges have on fuller consideration given to them been abandoned. The dictum, however, remains, and I am not able to explain it away. I am bound to say, as I do, that I think it unsound. Lord Watson gives no reasons for it. If his reasons are to be inferred from the prior passages in the judgment where he is describing the position of the privileged English community, it is not unfair to point out that that description, even if accurate when given, is certainly not accurate as at the date of this case.

Is there, then, any principle on which such a proposition can rest ? I can see none. I respectfully adopt on this branch of the subject what has just been said by the noble Viscount, whose opinion I had the advantage of reading before I wrote my own. The fallacy of the opposing argument seems to me to rest on the idea of extra-territoriality. That is a conception, which, having its legitimate application in such things as the position of an ambassador, or of a British ship in foreign territorial waters, has no application to the matter in hand. It seems to me that the whole privileges which were conceded by the Capitulations, or are now continued by the order of the present ruler of Egypt, are privileges which are made good by Egyptian law and not by English law. Can there be any inconsistency in the fact of an Egyptian domicil with the existence of a privilege given by Egyptian law to a certain class of persons, simply because that privilege sometimes consists in a law being applied which is not Egyptian law ? The opposite view seems to postulate the idea that you cannot be domiciled unless there is no possible difference between the law applicable to you and that applicable to every other native of the country in which the domicil is said to be acquired. On such a theory how could we explain the position of matters in India ? No one denies that a person may acquire an Indian domicil. Yet after he has done so the law to be applied to him will vary according as he is a Hindu, a Mussulman, or a person not professing either of those religions.

I think the appeal should be allowed. I agree with the opinion of Scrutton L.J., and I think it clear that Horridge J. would have come to the same result, had he not felt himself

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disentitled to go in the teeth of a dictum of Lord Watson which was so directly in point.

LORD ATKINSON. My Lords, I concur. The facts have been already stated.

Horridge J. found that it was abundantly proved that the Appellant had voluntarily fixed his sole or chief residence in Egypt, with the intention of continuing to reside there for an unlimited time, and the correctness of this finding of fact has not been questioned either by the Respondent's counsel in the Court of Appeal or in this House, nor is it questioned by either of the Lords Justices who constituted the majority in the Court of Appeal. The ordinary consequence of such a finding, if it stood alone, would, according to well-established authority, be that the Appellant should be held to have acquired a domicil of choice in Egypt. But it is contended that it cannot have that result in this case owing to two matters. First, the registration of the Appellant as a British subject, and second the so-called extra-territorial jurisdiction alleged to be exercised in Egypt by His Majesty the King of Great Britain, through his Consular Courts, under the Capitulations confirmed in 1809 by the Treaty of the Dardanelles, entered into between the Sultan of Turkey and Great Britain, conjoined with the English Order in Council of November 7, 1910. It is contended that, the Appellant being so registered, his residence in Egypt must, upon the authorities, be treated not as the residence of an ordinary inhabitant there but as that of a privileged member of an ex-territorial community unconnected with locality, and therefore incapable of conferring a domicil.

It is plain that Horridge J. would have held against this contention but for the decisions in two cases by which he considered he was bound. He decided accordingly that the Appellant's objection to his wife's petition failed. These two cases are *In re Tootal's Trusts* (1) decided by Chitty J. and *Abd-ul-Messih* v. *Farra*. (2) The majority of the Court

(1) 23 Ch. D. 532. (2) 13 App. Cas. 431.

of Appeal followed these cases, and applied what they considered to be the principle laid down in them. Scrutton L.J., in a most able judgment dealing exhaustively with all the authorities, showed conclusively, I think, that the principles said to have been laid down by these authorities, if they were such as was contended for, were unsound, and held as Horridge J. would have held had he considered himself free to do so, that the Appellant had acquired an Egyptian domicil of choice. In this conflict of judicial opinion it becomes necessary, I think, to examine carefully the decisions in these two comparatively modern cases, as well as the decision of Dr. Lushington in *Maltass* v. *Maltass* (1), and that of Lord Stowell in *The Indian Chief* (2), on which the decisions in the two former cases purport to be based, in order to distinguish the points of actual decision from the obiter dicta in which those most distinguished judges indulged, and to ascertain, if possible, what were precisely the principles upon which the decisions rested. In this connection I may say it would appear to me to be quite illegitimate to assume that the laws, habits, manners and customs of Eastern countries are stable, and have remained as repellent to English subjects now as they might have been a century ago, an assumption which, applied to Japan, if not indeed to Egypt, would be inaccurate and unjust. About the general law touching the acquisition of a domicil of choice in European countries, the United States of America or the self-governing colonies of the British Empire, there was no dispute. It is laid down as shortly and as neatly by Lord Lindley in his judgment in *Winans* v. *Attorney-General* (3) as could well be desired. He said: "I take it to be clearly settled—by the *Lauderdale Peerage Case* (4); *Udny* v. *Udny* (5); *Bell* v. *Kennedy* (6)—that the burden of proof in all inquiries of this nature" (i.e., as to domicil) "lies upon those who assert that a domicil of origin has been lost, and that some other domicil has been acquired. Further, I take it to be clearly settled that no person who is sui juris can change his domicil without a physical change of place, coupled with an intention

(1) 1 Rob. Eccl. 67.
(2) 3 C. Rob. 12, 22.
(3) [1904] A. C. 287, 299.
(4) (1885) 10 App. Cas. 692.
(5) (1869) L. R. 1 H. L. Sc. 441.
(6) (1868) L. R. 1 H. L. Sc. 307.

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to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicil is an intention to adopt the second residence as home, or, in other words, an intention to remain without any intention of further change except possibly for a temporary purpose: see Story's Conflict of Laws, s. 43, and *In re Craignish* (1); *Attorney-General* v. *Pottinger* (2); and *Douglas* v. *Douglas*. (3) An intention to change nationality was in *Moorhouse* v. *Lord* (4) said to be necessary, but in *Udny* v. *Udny* (5) that view was decided to be incorrect. Intention may be inferred from conduct, and there are cases in which domicil was held to have been changed notwithstanding a clear statement that no change of domicil was intended: *In re Steer* (6), and per Wickens V.-C. in *Douglas* v. *Douglas*." (7) In *Winans' Case* (8) the tastes, habits, conduct, actions, ambitions, health, hopes and projects of Mr. Winans deceased were all considered as keys to his intention to make a home in England. Lords Halsbury and Macnaghten laid down the law in words to the same effect as those used by Lord Lindley. They differed from him on the inference of fact to be drawn from all the matters I have mentioned as to Mr. Winans' intention to make a home in England. It was contended, however, on the authority of the case of *The Indian Chief* (9) decided by Lord Stowell and the cases which have followed it, "that the rules of law so laid down by Lord Lindley are entirely inapplicable to the acquisition by a British subject of a domicil of choice in an Eastern state on the ground of the supposed 'immiscibility' of such a subject with the native population."

The Master of the Rolls in the following passage of his judgment indicates what he apparently considers a British citizen must accomplish before he can acquire a domicil in one of those Eastern countries, no matter how long he may

(1) [1892] 3 Ch. 192.
(2) (1861) 6 H. & N. 733.
(3) L. R. 12 Eq. 643.
(4) (1863) 10 H. L. C. 272.
(5) L. R. 1 H. L. Sc. 441.
(6) 3 H. & N. 599.
(7) L. R. 12 Eq. 644.
(8) [1904] A. C. 287.
(9) 3 C. Rob. 12,22.

have voluntarily lived there, or how ardently he may have desired and intended deliberately to make his home there. (1) He said: "No question is raised on this appeal with regard to the domicil of a person who voluntarily fixes his place of residence in a foreign country, whether Christian or not, intending to make it his permanent home, intending to make himself a member of the civil society of that country, and manifesting this intention by adopting its manner of life, and identifying himself with its customs—not living in a community separate and apart, but merging in the general life of the native inhabitants. The Appellant has done nothing of the kind here, but has always been careful to preserve his status and position as a member of a privileged community, living separate and apart from the native inhabitants of Egypt."

The voluntary residence there, the deliberate intention to make a home there, are apparently not enough. The British subject must adopt the manner of life there, make himself a member of the civil society of that country. He must identify himself with its customs, he must merge in the general life of the inhabitants; but upon what rational principle? These are conditions which could not be fulfilled by a Hindu Brahman, faithful to his religion and bound by all the rigid rules of his caste, coming to reside in London. And compliance with them would not be possible in British India, where the population is not homogeneous but composed of different races living side by side, mingling little together, and professing different religions, observing different customs, obeying different laws. For instance, is the English resident in India to obey the laws binding on a Hindu and regulating the enjoyment and descent of his property or the laws touching these matters observed by the Mahometans? And if the former, are they to be the law of Mitakshara or the law of the Dayabhaga, and if the latter, is he to adopt the laws and customs of the Shiahs or of the Sunnis? How is it possible for a British subject "to adopt the manner of life of a population" where caste holds the majority of that population in its iron and unchanging grasp? In England, by

(1) [1918] P. 98.

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the common law, aliens could not hold landed property even under lease. By 32 Hen. 8, c. 16, s. 13, it is enacted that leases of dwelling-houses made to alien artificers should be void, and a penalty of one hundred shillings, a large sum in those days, was imposed upon the lessor or lessee who violated the statute. By 7 & 8 Vict. c. 66, aliens were empowered to hold land or houses for the purpose of residence or business, but they did not by this ownership acquire either the parliamentary or municipal franchise. They were disqualified to fill all offices or places of trust, civil or military. They could not inherit landed estate, nor, till the passing of the 11 & 12 Vict. c. 6, transmit it by descent. Things are now, of course, quite different; but, despite all these disabilities, this narrow, starved, and restricted citizenship, if such it could be called, which was all they could enjoy, they could acquire a domicil of choice in England. It is quite natural that the laws of an Eastern country, at least a century ago, might appear to a British citizen to be so arbitrary and oppressive, and the religion, customs and habits of the natives so repellent, that he would not be likely voluntarily to make his permanent home amongst them. The fact that the laws and customs were of that character would, therefore, be strong evidence on the issue of fact, the existence in his mind of an intention to make his home there. But if, despite the character of these laws, habits and customs, it be clearly established that the British subject who has voluntarily gone to reside in this foreign state desires to make his home there, and deliberately intends, if permitted, so to do, it is difficult to see upon what principle he should be debarred from acquiring a domicil there.

I do not think the authorities so much relied upon by the respondent, when examined closely, lay down any such principle as this latter. Before considering them it is desirable to point out that a very anomalous kind of domicil may be acquired in Eastern countries by resident merchants, owners of factories, or persons engaged in trading associations. It is wholly different from civil domicil, so different, indeed, that a merchant may at the same moment have a commercial domicil in each of several different and unconnected Eastern States,

in which he has established so many separate factories or trading associations. See *The Jonge Klassina*. (1) In the case of *The Indian Chief* (2) Sir William Scott laid it down that it was a rule of the law of nations that, whenever a factory is founded in an Eastern part of the world, European persons trading under their shelter and protection take their national character from the associations under which they live and carry on their commerce. I think it will be found that judicial observations, made in reference to this commercial domicil, have been treated as applicable to civil domicil, a most misleading error. The second kind of anomalous domicil is the Anglo-Indian domicil. The nature of this domicil is explained by Wood V.-C. in *Forbes* v. *Forbes*. (3) He said: "I apprehend that the question does not turn upon the simple fact of the party being under an obligation by his commission to serve in India; but when an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be animo et facto in India." Turner L.J. in *Jopp* v. *Wood* (4), referring to these cases, said: "At the time when those cases were decided the Government of the East India Company was in a great degree, if not wholly, a separate and independent Government, foreign to the Government of this country; and it may well have been thought that persons who had contracted obligations with such Government for service abroad could not reasonably be considered to have intended to retain their domicil here. They in fact became as much estranged from this country as if they had become servants of a foreign Government." When the officer left the service of the Company his domicil of origin revived: *Ex parte Cunningham*. (5)

In *The Indian Chief* (2), the ship in the year 1795 left the port of London on a voyage from that port to Madeira, thence

(1) (1804) 5 C. Rob. 297, 302.
(2) 3 C. Rob. 12, 22.
(3) (1854) Kay, 341, 356.
(4) 4 D. J. & S. 623
(5) 13 Q. B. D. 418.

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to Madras, Tranquebar, Batavia, and back to Hamburg. In the course of the last trip on this round voyage she called at Cowes for orders, where she was seized as being a ship belonging to an English subject trading with the enemy. A Mr. Johnson who claimed the ship as owner asserted that he was an American, not a British subject. A Mr. Miller, likewise asserting that he was an American subject, claimed the cargo as owner of it. The question in controversy in the case was the national character of these respective claimants. In the case of *The Angelique* (1) it had been decided by the Court of Appeal in England, that by the general law all foreigners resident within the British Dominions incurred all the obligations of British subjects, that as the Crown alone had power to make war, so it alone had power to dispense with the observance of these laws, that the East India Company had no power to license a trade carried on with the general public enemy of the Crown of Great Britain, and that, therefore, a ship belonging to an Armenian merchant resident in Madras taken on a voyage from Madras to Manilla, was properly condemned as the property of a British subject taken in trade with the enemy.

The events in Johnson's history affecting his national character were stated to be these. He was born in America. In the year 1773 he came to England and settled in London as a merchant. During the American war of 1778 he left England and settled in France as one of a firm engaged in trade—reserving to himself, by the articles of partnership, the liberty of returning to America should he so desire. In 1785 he returned to England, established himself as a merchant, and remained there till September, 1797, when he left two months before the capture of the ship. In the latter part of 1790 he acted as American Consul in London. That was, however, considered by Sir W. Scott as an immaterial circumstance. Had he remained till the capture of the ship, it was held that the whole transaction must be considered as a British transaction, and therefore a criminal transaction, on the principle that it is illegal in any person owing allegiance

(1) (1801) 3 C. Rob. Appdx. B. 7.

to the British Crown, as he did, as a merchant resident in England, even though that allegiance were temporary, to trade with the public enemy; but that inasmuch as he had quitted England for America before that date, sine animo revertendi, he was in the act of resuming his original character, and was to be considered to be an American, the character he gained by residence ceasing with that residence, and that he was, therefore, entitled to have his ship restored to him. Now these were the only matters in issue in Johnson's case, and the only matters decided in that case. In the case of Miller, it was held that if he had in fact engaged in trade in Calcutta he became a resident merchant, his mercantile character not taking the benefit of his official character. A point was made that the trading was not direct to Batavia, the enemy port; but that circumstance was held to be immaterial. A third point was urged—namely, that Miller had not been resident in British territory, since the English Sovereign was not in possession of Bengal with the same Imperial rights as belong to the Mogul, that the King of Great Britain did not hold British possessions in the East Indies in right of sovereignty, and therefore that the character of British merchants did not necessarily attach on British residents there. It was held that even assuming, as was contended, that Great Britain could not be deemed to possess sovereign rights in Bengal, still it was a rule of the law of nations that wherever a new factory is founded in an Eastern part of the world, European persons trading under the shelter and protection of that establishment take their national character from an association under which they live and carry on their commerce, that the sovereignty of the Mogul only existed as a phantom, did not in any way affect such establishments as these, that a foreign merchant resident at Bombay was just in the same position as a British merchant resident there, that he was subject to the same duties and amenable to the same common authority, and that therefore Miller should be considered as a British merchant, and his property be treated as that of a British merchant taken in trade with the enemy, and therefore liable to condemnation. These were the only issues

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properly raised and decided in the case. They referred exclusively to what is not very happily styled commercial domicil. The general observations made by Sir William Scott in this case of *The Indian Chief* (1) so far as they applied to civil domicil deal with matters wholly different in kind and nature from the subject-matter of the suits ; and though they are of high authority in one sense, owing to the eminence of the distinguished judge who made them, still they are, after all, only obiter dicta, and do not in any sense amount to decisions of the Court of Admiralty. In addition, the particular passage so much relied upon begins and ends with a reference to commercial transactions, and is based upon assumptions of fact which at the present day, at all events, are of questionable accuracy. The passage begins thus (2): "In the Western parts of the world alien merchants mix in the society of the natives ; access and intermixture are permitted; and they become incorporated to almost the full extent." Sir W. Scott then proceeds : "But in the East, from the oldest times, an immiscible character has been kept up ; foreigners are not admitted into the general body and mass of the society of the nation ; they continue strangers and sojourners as all their fathers were—Doris amara suam non intermiscuit undam ; not acquiring any national character under the general sovereignty of the country, and not trading under any recognized authority of their own original country, they have been held to derive their present character from that of the association or factory, under whose protection they live and carry on their trade." It will be observed that no reference is made in this passage to the so-called extra-territorial jurisdiction of Consular tribunals. It is the immiscible character of the foreigner on which the rule of law is based. However closely that character may have clung to English immigrants into Eastern States in the year 1800, I take leave to doubt very much if to-day British residents in Cairo or Alexandria do not mix more in the society of natives, and are not more completely incorporated into native society than they were over a century ago.

(1) 3 C. Rob. 12. (2) Ibid. 29.

In the other case to which Chitty J. refers—namely, *Maltass* v. *Maltass* (1)—the son of a deceased testator propounded the latter's will in the year 1844 in the Prerogative Court of Canterbury. The deceased himself was born at Smyrna of British parents, who were British subjects. After being educated in England he joined his father at Smyrna, was occupied in commercial pursuits there for many years, and was a member of a trading firm established there. This firm was dissolved a considerable time before the death of the deceased. In his will the deceased described himself as a British merchant, but the learned judge, Dr. Lushington, was unable to discover any evidence that he was engaged in trade at the time of his death. The commercial domicil principle was therefore questioned. He married at Smyrna, was constantly resident there, and died leaving a widow and several children. The question to be decided was what law governed the succession to his property. It was held that the law of his domicil must in some shape govern the succession. The inquiry as to domicil would be unnecessary if it should turn out that the law of Turkey applicable to this individual succession was the same as the law of Great Britain. Dr. Lushington held that by the Treaty of Dardanelles, 1809, the law of Great Britain operates on property left by a British merchant in the situation of the deceased, no distinction having been drawn in the case of the deceased having ceased to carry on trade. He studiously abstains, however, from expressing any opinion upon any question not necessary to be decided in the case. He gave no opinion as to whether a British subject can or cannot acquire a Turkish domicil, and added a sentence which, in my judgment, furnishes a key to this whole matter. He said: "But this I must say—I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte." Precisely so, since residence in a particular country, and an intention to make that residence a home for an indefinite period, are the elements necessary to create a civil domicil there. The existence of such an

(1) 1 Rob. Eccl. 67, 80, 81.

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intention is an inference of fact to be drawn from the conduct and action of the resident, and all the circumstances of the case. The observations already made apply as to the proof of that intention. The error, in my view, consists in treating the existence and nature of these native laws, habits and customs, not as facts from which the absence of the necessary intention may be inferred, but as forming an absolute bar to the acquisition by an English resident of a domicil of choice in an Eastern country.

I do not think the decision of *Tootal's Case* (1) was in conflict with this view. The struggle in that case was to show that the testator's domicil of choice was an Anglo-Chinese domicil, a term invented in analogy to the term Anglo-Indian domicil already explained, and, therefore, to get rid of his English domicil of origin, which if it had continued to exist would have made his personal estate subject to legacy duty. The facts were these. The testator went to reside at Shanghai in 1862. With the exception of two short visits to England in 1864 and 1865 for health and business, he continued to reside in Shanghai till his death in 1878. He was the manager and part proprietor of two newspapers published there. Uncontradicted evidence was given to the effect that for many years before his death he had determined to reside permanently at Shanghai, had relinquished all intention of returning to England, and on several occasions expressed his determination to that effect. Counsel for the petitioner, thinking apparently that their client's best chance of escaping the payment of the duty was by establishing for the deceased this fanciful thing, an Anglo-Chinese domicil, admitted that they could not contend that his domicil was Chinese. In giving judgment Chitty J., alluding to this admission, said: "This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in *The Indian Chief* (2) and by Dr. Lushington in *Maltass* v.

(1) 23 Ch. D. 532, 534 (2) 3 Ch. Rob. 29.

Maltass. (1) But it is contended on the part of the petitioners that the testator's domicil was what their counsel termed 'Anglo-Chinese,' a term ingeniously invented in analogy to the term 'Anglo-Indian.'" It will be observed that the existence of those Chinese laws, manners, habits, religion, and customs is not treated as establishing an absolute bar to the acquisition of a domicil of choice in China, but merely as raising every presumption against its acquisition, by leading one to infer that he, the testator, had no intention of making his permanent home in a place where he had so long resided. If the bar was absolute the term presumption was misapplied.

The learned judge, at an earlier part of his judgment, dealt with the extra-territorial jurisdiction set up at Shanghai under the treaties made between the then Queen of England and the Emperor of China in the years 1842, 1843, and 1858, the Statutes 6 & 7 Vict. c. 80 and c. 94, and the Order in Council of March 9, 1865, which constituted a Supreme Court at Shanghai. These treaties did not contain any cession of territory so far as related to Shanghai, but they very closely resembled those existing in Egypt. As in the present case, they conferred upon British subjects special exemption from the ordinary territorial jurisdiction of the Emperor of China, and permitted such subjects to enjoy their own laws at specified places. He then said that upon these facts the petitioners had contended that the testator had become a member of an organized British society, independent of Chinese laws and not amenable to the ordinary tribunals of the country, but bound together by the laws of England, and had therefore acquired an Anglo-Chinese domicil. He then (2) repeats what he had already said about the presumption arising from the habits, customs, etc., of the natives, and adds, "but there is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign territorial power. There may be, and there indeed are, numerous examples of particular sects or

(1) 1 Rob. Eccl. 67, 80, 81. (2) 23 Ch. D. 538.

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communities residing within a territory governed by particular laws applicable to them specially. British India affords a familiar illustration of this proposition. But the special laws applicable to sects or communities are not laws of their own enactment, they are merely parts of the law of the governing community or supreme power." And he winds up by saying (1) that there is no such thing known to the law as an Anglo-Chinese domicil, that the testator's domicil remained English, and that therefore his personal property was liable to legacy duty. These were the only matters decided. Incidentally it was said that native manners, customs, etc., may have effect as evidence of the absence of intention to make a home amongst them. That is all.

In *Abd-ul-Messih* v. *Farra* (2) the appellant instituted a suit in Her then Majesty's Supreme Consular Court of Constantinople to obtain probate of the will of her husband, Antonis Youssef Abd-ul-Messih, who died at Cairo in February, 1885, leaving large personal estate, having previously acquired the position of a protected British subject. The widow's application was opposed by the next of kin of the deceased on its merits, and also on the ground that the Court had no jurisdiction in the matter. Two issues were ultimately framed by or with the consent of the parties: 1. "Is the English law to be followed in distributing the assets of the deceased?" and 2. "If the Court is of opinion that the English law is not applicable, is Turkish, or what other law?" The Consular Court by the Order appealed from, dated May 28, 1886, found that the testator died domiciled in the Ottoman Empire, his domicil of origin, and a member of the Chaldean Catholic community, and decreed accordingly that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey should be followed in considering the deceased's power of testacy, and in distributing his effects. But for the fact that he had enjoyed British protection it would have been clear that at the time of his death he had his domicil in the dominions of the Porte. If he ever had acquired a domicil of choice in India he had lost that domicil

(1) 23 Ch. D. 542. (2) 13 App. Cas. 431.

when he left India and came to live in Cairo, his domicil of origin then reviving. But it was contended by the appellant that by reason of his living at Cairo under the enjoyment of British protection he had acquired this fanciful thing, an Anglo-Egyptian domicil, not based upon connection with English soil. The testator's history was, as far as it was relevant, shortly this. He was born at Baghdad of Ottoman parents resident there. He then went to India, and remained there for a considerable time. He then returned to the Ottoman dominions, going to reside in Jeddah. He left Jeddah in 1858 and went to live in Cairo, Egypt not then being independent, and registered himself so as to become a British protected subject. In 1876 he married the appellant, the ceremony being performed in the manner prescribed by 12 & 13 Vict. c. 68, a statute enacted to facilitate the marriages of Her then Majesty's subjects resident abroad. Lord Watson, in delivering judgment, said (1): "The idea of a domicil, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicil to be found in the books. In most, if not all of these, from the Roman Code (10.39.7.) to Story's Conflict (§ 41), domicil is defined as a locality—as the place where a man has his principal establishment and true home." He then cited the well-known passages from the judgments of Lord Westbury in *Bell* v. *Kennedy* (2) and *Udny* v. *Udny* (3), and having conclusively shown that the testator could not acquire an Anglo-Egyptian domicil, said: "The appellant lastly endeavoured to maintain that the deceased's residence in Cairo had at least the effect of giving him an Egyptian as distinguished from a Turkish domicil. That argument was not addressed to the Court below; but there appear to be two sufficient answers to it. The one is, that the appellant has not shown that a domicil in Egypt, so far as regards its civil consequences, differs in any respect from a domicil in other parts of the Ottoman Dominions; and the other, that residence in a foreign State,

(1) 13 App. Cas. 439, 445. (2) L. R. 1 H. L. Sc. 320.
(3) Ibid. 458.

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as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice." It is, I think, quite plain that what Lord Watson meant was this, that though the testator's residence in Cairo could not, under the circumstances, create this so-called Anglo-Egyptian domicil, his residence there might be effectual to destroy any domicil of choice which he might have previously acquired in India, and that having thus been left without any domicil of choice, his domicil of origin would revive. So that really the only points raised in the case and actually decided were that there can be no such thing as the so-called Anglo-Egyptian domicil, since it is not connected with locality, as all domicil must be, and consequently that the testator did not acquire such a domicil, that the testator's domicil of origin had revived, and that therefore the order of the Consular Court appealed from was right. Two passages in Lord Watson's judgment have, however, given occasion to much argument on this appeal. Both are to be found on p. 439 of the report. In dealing with the question of the Anglo-Egyptian domicil of choice claimed for the testator, after alluding to the fact that Cairo was not a British possession governed by English law, and was not British soil, but the possession of a foreign Government, and subject to the sovereignty of the Porte, he proceeded to say : " Certain privileges have been conceded by treaty to residents in Egypt, whether subjects of the Queen or foreigners, whose names are duly inscribed in the register kept for that purpose at the British Consulate. *They are amenable only to the jurisdiction of our Consular Court in matters civil and criminal; and they enjoy immunity from territorial rule and taxation. They constitute a privileged society, living under English law, on Egyptian soil, and independent of Egyptian Courts and tax gatherers.* The appellant maintained that a community of that description ought, for all purposes of domicil, to be regarded as an ex-territorial colony of the Crown; and that permanent membership ought to carry with it the same civil consequences as permanent residence in England, or in one of the colonial possessions of Great Britain, where English law

prevails." He then proceeds to show that domicil cannot be independent of locality. The second passage which follows immediately after the quotation from the judgment of Lord Westbury in *Udny* v. *Udny* (1) runs as follows: "According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend. But the law which thus regulates his personal status must be that of the governing power in whose dominions he resides; and residence in a foreign country, without subjection to its municipal laws and customs, is therefore ineffectual to create a new domicil." The italics are mine. The passage in italics gives a very incorrect description of the true position at the present time of this privileged community in Egypt. It is not true that its members are only amenable to the jurisdiction of the Consular Courts in matters civil and criminal. They are in many matters, as I shall presently show, subject to the jurisdiction of the Mixed Tribunals, which are Egyptian Courts established by an Egyptian statute. And even in the case of the Consular Courts its decrees and orders are enforced and carried out, not by Consular, but by Egyptian officers. Neither is it true that they enjoy immunity from territorial rule or taxation, or that they are independent of Egyptian Courts and tax gatherers. They pay such taxes as the English Sovereign has, by arrangement with the Khedive, consented that they should pay. The only point decided in the case was that the testator, a subject of the Porte by birth and parentage, had not, and could not, acquire an Anglo-Egyptian domicil. The obiter dicta observations made by Lord Watson were made in reply to the extravagant contention that for the purpose of acquiring such a domicil Cairo was to be taken as a possession of the British Crown, where English law prevailed; but it will be observed that he says nothing about the necessity of a person who voluntarily resides in a particular place with the intention of making it his home, in addition manifesting a desire to adopt the manners of life of native society, or

(1) L. R. 1 H. L. Sc. 458.

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identifying himself with its customs, upon which the learned Master of the Rolls apparently insisted.

I cannot think that by the words "attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity," Lord Watson ever meant to lay it down that the foreign resident must be bound by all the laws that bind natives, and by no other laws, and must observe all the lawful customs that natives observe; else the existence of the slightest exemption from the operation of the ordinary municipal law conferred upon a foreign resident as a privilege would make the acquisition of a domicil of choice by him impossible, especially in India, where different systems of law touching majority and minority, succession to property, testacy and intestacy of the Hindu and Mahommedan races differ substantially. Indeed, during the argument of Sir Ellis Hume Williams, I asked him if the extra-territorial jurisdiction of the Consular Courts only extended to actions of libel and slander between British subjects or protected persons, would it still make the acquisition of an Egyptian domicil of choice impossible? And I did not get a very positive answer. I cannot but think a fallacy lurks in the phrase "municipal law." Surely if by a special law of the Sovereign power of a state some section of society is relieved from a duty or burden imposed upon the general community by a general municipal law, the municipal law, the lex domicilii, which that section should "attract to themselves" in order to acquire a domicil would be the general municipal law as modified by the special law passed in their favour. For instance, if after this war an Act of Parliament were passed in England that every French citizen coming to reside in England would be relieved of 75 per cent. of the income tax payable by English residents with equal incomes the municipal income tax laws which he would be bound to obey would be the income tax Acts so modified. He would not have to pay up to 75 per cent. of his income tax to acquire in England a domicil of choice, and the fact, if it were a fact, that this special Act was passed in pursuance of a treaty made between England and France would not alter

matters in the slightest degree. During the argument these Consular Courts were treated as if they were set up, and the jurisdiction they exercised was conferred upon them, by an act of the British Crown propio vigore, altogether independent of the Sultan of Turkey or the Khedive of Egypt. In my opinion that is not the correct view. They are set up, and jurisdiction is conferred upon them, by the consent, and in the exercise of the power, of the legislative governing authority of Egypt. The lex domicilii for these English residents is the general law of Egypt applicable to native Egyptians modified by the provisions of the Capitulations and the statute dealing with the Mixed Tribunals. It matters nothing, in my view, that these Courts were set up and jurisdiction conferred upon them in pursuance of a treaty.

By Article 9 of the Statute of Judicial Organization for Mixed Courts in Egypt, 1892, an Egyptian statute establishing Egyptian Courts, exclusive jurisdiction is conferred upon these Courts over all civil and commercial causes (not coming within the law of personal status) between Egyptians and foreigners, and between foreigners of different nationalities. Jurisdiction (though not apparently exclusive) is also conferred in all actions relating to real rights over immovable property between all persons, even those belonging to the same nationality. By Article 13 it is provided that the bare fact of the creation of a mortgage of immovable property in favour of a foreigner, whoever be the possessor and owner of the property, shall render these Courts (i.e., the Mixed Courts) competent to adjudicate upon the validity of the mortgage, and upon all its consequences up to and including the forced sale of such property as well as the distribution of the proceeds. By Articles 6, 7 and 8 of Title II. of the Statute, prosecutions for petty offences in addition to the trial of persons as principals or accomplices for any one of a vast number of felonies and misdemeanours, including wounding and homicide, are made subject to the jurisdiction of the Egyptian Courts whoever the accused may be, whether native or foreigner. By Article 4 of the Preliminary provision it is enacted that questions relating to legal status and capacity of persons, and

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to the law of marriage, to the rights of natural and testamentary succession, and to guardianship and curatorship, remain in the jurisdiction of the Personal Status judge. The 15th of the Articles of Capitulation and Peace of 1676, confirmed by the treaty of 1809, provided for litigation between Englishmen and others being dealt with in the Egyptian Courts. The 24th Article did the same: a safeguard is provided; the Ambassador, Consul or interpreter must be present. The 52nd Article is to the same effect. By the 16th Article the foundation was laid upon which the so-called extra-territorial jurisdiction was erected. It provided that if there happened to be any suit or other difference or dispute amongst the English themselves, the decision thereof shall be left to their own Ambassador or Consul, according to their custom, without the judge or other governors (our slaves) interfering with them.

The Order in Council of November 7, which merely prescribes the mode in which any jurisdiction belonging to the Sovereign of Great Britain shall be exercised, does not carry the matter any further. In the face of these enactments it cannot, I think, be said with the faintest approach to accuracy that British subjects properly so called and British protected persons "constitute a privileged society living under English law on Egyptian soil and independent of Egyptian Courts and tax gatherers." The main, indeed the only, contention of the respondent in this appeal—namely, that the existence of the extra-territorial jurisdiction rendered impossible the acquisition by a British subject of a domicil of choice in Egypt—is, in my view, unsupported by authority, and wholly fails. I concur with Scrutton L.J. in thinking that there is no test which must be satisfied for the acquisition of a domicil of choice in Egypt other than, or in addition to, those which must be satisfied to acquire a similar domicil in a European country—namely, voluntary residence there plus a deliberate intention to make that residence a permanent home for an unlimited period. On the whole, therefore, I am of opinion that the order appealed from was wrong, and should be reversed, and this appeal should be allowed with costs here and below.

LORD PHILLIMORE. My Lords, the jurisdiction of the High Court of Justice in its matrimonial division is founded upon domicil. The domicil must be in England.

In this case the husband who has been sued by his wife had no doubt his domicil of origin in England, and the burden lies upon him, as he disputes the jurisdiction, to show that he has acquired another domicil. But Horridge J. has found, and it is not disputed that he has rightly found, that if it be possible for the husband to have changed his domicil of origin into an Egyptian domicil he has done so. I think also that if Horridge J. had not felt himself fettered by authority he would have held that there was no impossibility in the husband's acquiring an Egyptian domicil.

The authorities on which the counsel for the wife rely are apparently cited for two different purposes. The one is to show the improbability of an European Christian intending to change his domicil for one in an Oriental and un-Christian country, and they certainly show that this improbability is considerable. Domicil being acquired animo et facto the tribunal which determines the facts will take this improbability into its very serious consideration, but it is only an improbability and not an impossibility; and, as Dr. Lushington observed in *Maltass* v. *Maltass* (1), this improbability diminishes if the habits or religion of a person are not inconsistent with those of the country to which he has migrated. Here the husband is of Greek extraction, his wife apparently is an Egyptian; he married her in Egypt, and the branch of the Christian Church to which he is attached is one that has a considerable footing throughout the Levant and in Egypt.

In *TheI ndian Chief* (2) Sir William Scott had to consider whether a merchant of American nationality resident in the English factory at Calcutta could be allowed to trade as a neutral with the enemy or whether he should be considered as a temporary British subject by reason of his residence under British protection. It was suggested on behalf of the claimant that Calcutta was to be considered as part of the dominions of the Great Mogul, on behalf of the Crown that it was an

(1) 1 Rob. Eccl. 67. (2) 3 C. Rob. 22.

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imperium in imperio, and upon this latter principle and in conformity with some other decisions as to residence in Dutch and English factories in the East Indies the claimant was deemed to be in the position of a British subject trading with the enemy, and his goods were condemned.

In the course of his judgment and in support of his conclusions Sir William Scott dwelt upon the peculiar and isolated position of Europeans gathered together in factories in the East and the immiscibility of the European with the Oriental.

In *In re Tootal's Trusts* (1) an Englishman living and dying in China, and the evidence being that he had determined to reside permanently in China, made a will in English form which according to the peculiar privileges granted to Europeans in China was proved in the British Consular Court. The question was whether legacy duty should be paid on his bequests. If he was domiciled in England it had to be paid. If he was domiciled anywhere else it had not to be paid. The first line of defence might have been that he was domiciled in China. Counsel for the legatees, however, gave up the contention for a Chinese domicil, and did this with the approbation of the judge, who thought that having regard to the difference of Chinese habits, manners and religion, more was required to establish a change of domicil than would be required if the change was to a country of western civilization, and that this *more* had not been established. Whether their admission was right or wrong was not a matter of judicial determination, and the approbation was given by a judge who was apparently unassisted by argument.

The first line of defence having been given up, counsel argued that there was such a thing as an Anglo-Chinese domicil arising out of the existence of the peculiar privileges of Englishmen and other Europeans in China, and the establishment of Consular Courts, which was neither English nor Chinese, but a tertium quid. This contention Chitty J. rejected, holding, and certainly rightly holding, that domicil is not acquired by membership of a community but by residence in a locality, and that if the testator had not a Chinese

(1) 23 Ch. D. 532.

domicil he retained his English domicil. This decision of Chitty J., and it is the only point which he decided, so far from supporting the decision in the present case, is, as will be hereafter seen, rather opposed to it. As to the bearing of dissimilarity of habits upon the probability of a change of domicil I adopt the opinion of Horridge J. that this dissimilarity is an element to be considered, but nothing more.

The second and more important purpose for which the counsel for the wife relied upon the authorities, was to establish, if they could, the proposition that British subjects having a domicil of origin somewhere in the British Empire could not acquire a domicil of choice (or that no evidence which could be given would prove a choice) in any Oriental country subject to the régime established by the Capitulations in Turkey or by analogous treaties with China and other Oriental countries. It was said that the effect of these arrangements was to put a British subject in a position of extra-territoriality not dissimilar to that of an ambassador, and that his residence as one of a privileged and protected community was a mere prolongation of his previous residence under direct British sovereignty. For this purpose *In re Tootal's Trusts* (1) and the cases of *Abd-ul-Messih* v. *Farra* (2) and *Abdallah* v. *Rickards* (3) are those upon which the principal reliance was placed.

Upon a careful examination of *Tootal's Trusts* (1) it will be seen that it lends no support to this proposition. Chitty J., in stating his reasons for approving the concession of counsel, does not rely upon the privileges of Englishmen in China as affording any reason against a change to a Chinese domicil. Indeed, if Tootal could by preserving his English nationality have kept his privileges though he acquired a Chinese domicil, it would rather seem that one motive for abstaining from change was thereby removed. When the existence of these privileges was relied upon to support the peculiar Anglo-Chinese domicil for which counsel contended, Chitty J. apparently attached no weight to the argument.

(1) 23 Ch. D. 532. (2) 13 App. Cas. 431.
(3) 4 Times L. R. 622.

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If Tootal instead of having an English domicil of origin had been a British subject of Chinese race and habits with a domicil of origin at Hong Kong or Singapore, there is no reason to suppose that Chitty J. would have found any difficulty in accepting a change of domicil to China or that the existence of the British Consular Court with its jurisdiction over all British subjects would have been considered as a reason against a change of domicil.

In *Abd-ul-Messih* v. *Farra* (1) the testator was a Turkish subject professing the Mahommedan faith. Under the Mahommedan law, which applies in Turkey at any rate to all persons of that religion, the liberty of testacy is restricted, and such part of the estate as cannot be disposed of by will descends in a particular manner. It did not suit the interests of the widow that the Mahommedan law should prevail, and therefore she set up a case for an English or Anglo-Egyptian domicil.

The testator was born at Baghdad, and, after some time spent in India, took up his residence at Jeddah, and finally went to Egypt, where he died, all these places being in the Ottoman dominions.

When he went to Egypt he registered himself as a protected British person, and it was upon this slender foundation and his temporary residence in India that counsel for the widow argued for an English domicil.

When that failed her counsel took up a second point of the nature of that which the late James L.J. used to call a tabula in naufragio, that the deceased has acquired an Anglo-Egyptian domicil (why an Anglo-Egyptian rather than an Indo-Egyptian or indeed a Scoto-Egyptian did not appear), which would attract to itself the English law of succession; and this contention was also rejected by the Privy Council. So far as the decision went it tended in the same direction as that in *In re Tootal's Trusts* (2), towards the disregard of the existence of special privileges for Europeans and the establishment of Consular Courts as an element of any importance in considering the question of domicil.

(1) 13 App. Cas. 431. (2) 23 Ch. D. 532.

The two points actually decided were, as stated in the judgment of Swinfen Eady L.J., that the community of British subjects and persons having the status of protected British persons in Egypt was not an ex-territorial colony of the Crown, and that permanent membership of it did not carry with it the same civil consequences as permanent residence in England. It was no doubt further stated that supposing it to be an ex-territorial community residence in it would not create a domicil of choice. But this was stated in respect of a Turkish subject moving from one part of the Ottoman dominions to another and supposed to be thereby seeking to acquire, not a domicil in the new part if that would make any difference, but a domicil which would be given by residence as a member of the supposed extra-territorial community. Scrutton L.J. drew, I think, the right conclusion from this judgment. But his colleagues were led away by attaching too much importance to certain dicta in the judgment as stating the law of England and, what is even more doubtful, the law of Egypt. Speaking with all respect, I must say that the passage which states the position of British subjects in Egypt according to Egyptian law (a point which was immaterial because the testator was held not to be a British subject) states that law to some extent incorrectly. It is open to me to say this because the position in Egypt is a matter of Egyptian law, and foreign law according to our jurisprudence is treated as fact, not law.

The judgment ignored the existence of the Mixed Tribunals in Egypt, and treated British subjects as amenable only to the British Consular Courts. It also spoke of them as immune from all local taxation. This last fact may or may not have been so in 1888 when the judgment was delivered. It is not the case now. As to the Mixed Tribunals they were established in 1876 by a Decree of the Khedive, made, no doubt, with the consent of the principal European Powers, but by virtue of his delegated authority under the Ottoman Porte. The Tribunals consist partly of foreigners and partly of Egyptians. There is no special requirement that the foreign judge in any particular case should be of the nationality of

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the European whose case is before the Tribunal, and they are given jurisdiction "over all civil and commercial causes not coming within the law of Personal Status between Egyptians and foreigners and between foreigners of different nationalities. They shall also have jurisdiction in all actions relating to real rights over immovable property between any persons, even persons belonging to the same nationality." They have also in several matters criminal jurisdiction over foreigners, even in some capital cases. If, therefore, it is a principle of law (as to which I should desire to reserve my opinion) that "residence in a foreign country, without subjection to its municipal laws and customs, is . . . . ineffectual to create a new domicil," the principle does not affect a British subject resident in Egypt so as to make it impossible for him to acquire an Egyptian domicil.

The other passage which is relied upon in support of the judgments in the courts below runs as follows: "Residence in a foreign State, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil elsewhere, is ineffectual to create a new domicil of choice."

This passage professes to be an answer to the argument that the deceased had at least acquired an Egyptian instead of a Turkish domicil. Whether an Egyptian or an Anglo-Egyptian domicil is meant is not clear. I have not found any trace in the report of the suggestion that the law of Egypt differs as to succession from that of other parts of the Ottoman dominions. Be this as it may, let me apply the general statement to the concrete facts: Residence at Cairo as a British protected person may suffice to destroy any domicil acquired in India or at Jeddah, but it is not sufficient to destroy the domicil of origin at Baghdad and give a new domicil of choice, either an Egyptian or an Anglo-Egyptian one. If an Egyptian domicil proper is intended this passage does give weight to the connection with a privileged community; but then there was no importance in an Egyptian domicil. If an Anglo-Egyptian domicil is meant the passage shows what little weight their Lordships attached to the privileged community.

In *Abdallah* v. *Rickards* (1) Chitty J. took this last passage in *Abd-ul-Messih* v. *Farra* (2) as stating the law. But all that he decided was that a testator who had a domicil of origin in England, went to the Turkish dominions, married a Mahommedan, returned to England and married a Christian, went again to the East (Syria) and lived and died there, keeping up his English habits and registering himself as a British subject, could not be held to have intended to change from his British domicil. This may, or may not, have been a right decision upon the facts, but whatever its weight or its applicability it is not binding upon this House.

These decisions, or at any rate the principles supposed to be extracted from them, have been commented upon and dissented from in an important decision of the Supreme Court of Maine: *Mather* v. *Cunningham.* (3) It is true that in two cases in the Egyptian Prize Court the learned judges have given their adhesion to them. But, on the other hand, in *The Eumaeus* (4) the President expressly reserved his opinion upon the principle supposed to be extracted from *In re Tootal's Trusts.* (5)

In this very case Swinfen Eady L.J., as I read his judgment, and certainly Warrington L.J., thought that if the husband had segregated himself from the European community he could have acquired an Egyptian domicil. If by imposing this condition they meant that he must have renounced his British nationality they make nationality the criterion of domicil, which is contrary to all authority. If they did not mean that, non-segregation is only a factor to be considered as a piece of evidence of the person's intention.

My Lords, it does not appear to me that the position of Europeans in the Ottoman dominions under the régime of the Capitulations, or under any modification of them of which we have cognizance in the now independent State of Egypt, is rightly described as extra-territorial.

It is possible that this description might have been applied to the ancient Dutch and English factories in the East Indies, and it may be that in the case of *Abd-ul-Messih* v. *Farra* (2)

(1) 4 Times L. R. 622.
(2) 13 App. Cas. 431.
(3) 105 Maine, 326.
(4) 1 Br. & Col. P. C. 615.
(5) 23 Ch. D. 532.

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it was assumed upon the imperfect materials before the Privy Council that the position in Egypt was like that of a factory.

Under the Capitulations and the subsequent treaties and arrangements with Turkey, with Egypt under the Khedive as still a part of the Ottoman dominions, with Egypt now as a protected State, and under the analogous arrangements which exist in China and at one time existed in Japan and Zanzibar, Europeans of many nations, including the British, have peculiar privileges and some immunities, the measure of which is to be found in the expressed terms of the several grants. In so far as it may be said that the effect of them is to constitute separate little national communities, this is immaterial on the question of domicil.

The result is that while there is authority for saying that there is improbability in the change of domicil to an Oriental country, even a so highly civilized one as Egypt, there is no legal impossibility.

My Lords, I think that the trend of Horridge J.'s mind was in the right direction, and that the decision of Scrutton L.J., which has been of great assistance to your Lordships, was right, and that the judgment of the other learned Lord Justices has not sufficiently analysed the actual points decided, and has attached too much weight to the dicta, in the cases which have so often been quoted.

It is established, I think, that the husband had a domicil in Egypt, and was therefore not subject to the High Court of Justice in England in its matrimonial jurisdiction.

I am of opinion that the appeal should be allowed.

Order of the Court of Appeal reversed; judgment entered for the appellant upon his Act on Petition, and the respondent's petition for dissolution of the marriage dismissed. The respondent to pay the costs in the courts below and also the costs of the appeal to this House.

Lords' Journals, October 28, 1918.

Solicitors for the appellants: *Hatchett-Jones, Bisgood, Marshall & Thomas.*

Solicitors for the respondent: *Treherne, Higgins & Co.*

[HOUSE OF LORDS.]

FRED. DRUGHORN, LIMITED Appellants; H. L. (E.)* 1918 November 12.

AND

REDERIAKTIEBOLAGET TRANSATLANTIC . . . . . Respondents.

Ship—Charterparty—Principal and Agent—Contract by Agent as "Charterer"—Right of Undisclosed Principal to Sue—Evidence of Authority—Admissibility.

The description in a charterparty of one of the contracting parties as "charterer" does not, of itself, designate him as the only person to fill that position.

Where, therefore, an action for breach of charterparty was brought by persons claiming to be the undisclosed principals of a party described in the contract as "charterer," and objection was taken to the admission of evidence that the plaintiffs were in fact the charterers, on the ground that such evidence would contradict the written contract:—

Held, that the evidence was admissible.

Humble v. *Hunter* (1848) 12 Q. B. 310 and *Formby Brothers* v. *Formby* (1910) 102 L. T. 116 distinguished.

Decision of the Court of Appeal [1918] 1 K. B. 394 affirmed.

Appeal from a decision of the Court of Appeal [1918] 1 K. B. 394, affirming an order of Lush J.

By a charterparty dated February 8, 1910, made on a printed form, it was mutually agreed between the appellants, "Messrs. Fred. Drughorn, Ltd., Owners of the screw steamship called the *England*, . . . and Wilh. R. Lundgren, of Gothenburg, Charterer," that the "owners" should let and the "charterers" should hire the said steamship for a period of twenty-four calendar months from the date of delivery, and the charterers were to have the option of keeping the steamer for a further period of twelve months on giving the owners not less than four months' notice. The charter described the steamship as "intended to trade regularly from Scandinavian or other Baltic ports to South Africa and back via India, Australia, Mauritius, East or River Plate in charterers' option," and gave certain further options to the charterers as to limits of trading.

* *Present:* Viscount Haldane, Lord Shaw of Dunfermline, Lord Sumner, and Lord Wrenbury.

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The charterparty was headed "Swedish South African Line. Wilh. H. Lundgren, Manager, Gothenburg. Telegrams: Nike, Gothenburg." It was signed by J. E. Hyde & Co., "by telegraphic authority of and as agents for Wilh. R. Lundgren." The steamer was delivered under the charterparty on May 14, 1910, and Lundgren duly exercised his option to extend the hire for a further period of twelve months beyond the original period of twenty-four months.

In December, 1912, the appellants withdrew the steamer from the service of Lundgren upon the ground that she had performed voyages not sanctioned by the charterparty. Thereupon Lundgren commenced an action against the appellants for damages for breach of charterparty. Before the action came on for trial Lundgren died, and the respondents were substituted as plaintiffs in place of him. The respondents were a Swedish company, of which Lundgren had been manager, and they claimed that the charterparty had been entered into by Lundgren as agent on their behalf. The appellants denied the agency.

The action came on for trial before Lush J. At the trial the appellants contended as a preliminary point of law that evidence to show that Lundgren had entered into the charterparty as agent for the respondents was inadmissible as being inconsistent with the terms of the charterparty, in which Lundgren was described as charterer. The learned judge overruled this contention. The respondents then called a witness to show that they were in fact Lundgren's principals; but during his cross-examination it became necessary to adjourn the further hearing for the inspection of certain documents in Sweden. The judge then made an order which was treated by both parties as declaring that evidence that the respondent company were principals was admissible. The Court of Appeal (Swinfen Eady and Warrington LJJ.) affirmed the decision of Lush J.

1918. November 11, 12. *Compston, K.C.*, and *Jowitt* for the appellants.

The description in the charterparty of Lundgren as "charterer" designates him as the person to whom the rights of the contract are given and shows that he was contracting as principal. It is a term of the charterparty that Lundgren shall be the charterer, and he alone can sue upon it. The general principle, as stated in *Sims* v. *Bond* (1), is that where a contract is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, but upon that general principle there is engrafted an exception that where the instrument describes a party as contracting in a certain capacity, evidence cannot be admitted to show that he was contracting in some other capacity, as that would be to contradict the terms of the contract. *Humble* v. *Hunter* (2) applies. It was there held that where a charterparty described a person as "owner" of the ship, evidence was not admissible to show that he contracted as agent. That case does not turn upon any distinction between "owner" and "charterer," but turns upon the fact that the contracting party has given himself a special description which is inconsistent with the idea that he is contracting as agent. That decision, notwithstanding that it has been questioned by Lord Russell of Killowen in *Killick & Co.* v. *Price & Co.* (3), has been followed by the Court of Appeal in *Formby Brothers* v. *Formby.* (4) In *Rederiaktiebolaget Argonaut* v. *Hani* (5) Rowlatt J. applied the principle of *Humble* v. *Hunter* (2) to the description of one of the parties to a charterparty "as charterer." See also *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (6)

MacKinnon, K.C., and *Simey* for the respondents were not called on.

VISCOUNT HALDANE. My Lords, this is an appeal from a judgment of the Court of Appeal which affirmed the judgment of Lush J. The only question before us is whether evidence was admissible on a certain point. The wording of the order

(1) (1833) 5 B. & Ad. 389.
(2) 12 Q. B. 310.
(3) (1896) 12 Times L. R. 263.
(4) 102 L. T. 116.
(5) [1918] 2 K. B. 247.
(6) [1915] A. C. 847.

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might if unexplained give some countenance to the proposition that the Courts had intended to pronounce upon the effect of the evidence so admitted, whether rightly admitted or not; but it is agreed between counsel, and it is plain from what was said by Lush J. himself subsequently, that that was not the intention. Therefore the only question before the House upon which the House has to pronounce is whether the evidence sought to be admitted was evidence which was in law admissible.

My Lords, by the law of England if B contracts with C prima facie that is a contract between these two only, but if at the time B entered into the contract he was really acting as agent for A, then evidence is generally admissible to show that A was the principal, and A can take advantage of the contract as if it had been actually made between himself and C. That is what is meant by ratification.

My Lords, the limits within which that doctrine is applicable were fully examined in this House in the case of *Keighley, Maxsted & Co.* v. *Durant.* (1) No question arises with regard to the applicability of the doctrine in this case, because what is said is that the respondents can prove that as a matter of fact B was acting as the agent for them in the case before us at the time when he entered into the contract.

But, my Lords, the principle is limited by another consideration, about which again there is no doubt, and the applicability of which to the present case is beyond question. In *Humble* v. *Hunter* (2) it was approved, although it was not necessary to give a decision on the point, and also in *Formby Brothers* v. *Formby* (3) and in other cases. These are authorities for the proposition that evidence of authority of an outside principal is not admissible, if to give such evidence would be to contradict some term in the contract itself. It was held in *Humble* v. *Hunter* (2), that where a charterer dealt with someone described as the owner, evidence was not admissible to show that some other person was the owner. That is perfectly intelligible. The question is not before us now,

(1) [1901] A. C. 240. (2) 12 Q. B. 310.
(3) 102 L. T. 116.

but I see no reason to question that where you have the description of a person as the owner of property, and it is a term of the contract that he should contract as owner of that property, you cannot show that another person is the real owner. That is not a question of agency—that is a question of property.

My Lords, in the same way in *Formby Brothers* v. *Formby* (1) the term was "proprietor," and "proprietor" was treated in the opinion of the Court of Appeal as on the same footing as the expression "owner." But, my Lords, we are not dealing with that case here. The principle remains, but the question is whether the principle applies to a charterparty where the person who says that he signed only as agent describes himself as the charterer.

My Lords, there may be something to be said from the heading of the charterparty in this case, and the reference to the company which claims to have been his principal, for the proposition that, reading the document as a whole, there is evidence that he intended to convey that he was acting as agent for somebody else; but whether that is so or not the term "charterer" is a very different term from the term "owner" or the term "proprietor." A charterer may be and prima facie is merely entering into a contract. A charterparty is not a lease—it is a chattel that is being dealt with, a chattel that is essentially a mere subject of contract; and although rights of ownership or rights akin to ownership may be given under it prima facie it is a contract for the hiring or use of the vessel. Under these circumstances it is in accordance with ordinary business common-sense and custom that charterers should be able to contract as agents for undisclosed principals who may come in and take the benefit of the charterparty.

But, my Lords, it is said that in this charterparty the terms are such as to exclude that notion. Why is that said to be so? Because the term "charterer" is used. Well, I have already commented upon that. It is said that the term "charterer" was meant simply to describe a particular person

(1) 102 L. T. 116.

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who is to carry out the nomination of arbitrators and everything else which is contained in the charterparty—to give orders which can only be given by one person, and that for the working out of the charterparty it is essential to treat the person so contracting as designated as a person whose identity cannot be varied or contradicted.

My Lords, the answer is that the principal may take that place, and that the company, in this case acting through its agent, whoever that agent may be, will be in the same position as the charterer contracting originally. There is nothing in that position inconsistent with the stipulations of this charterparty, and therefore it appears to me that the qualifying principle of *Humble* v. *Hunter* (1), that you shall not contradict the instrument by giving evidence of agency, has no application in this case.

My Lords, the way in which the point arose was this. The owners of the ship, the appellants, dissatisfied with the way in which the ship was being handled by the charterer, withdrew it from his service, with the result that the original charterer, Lundgren, began an action in the King's Bench Division to recover damages. In that action the respondents, alleging that they were his principals and had been throughout, were substituted as plaintiffs, and apparently no question was raised at the moment of their substitution, which would have been the natural time to raise the point; but later it was proposed to give evidence, and evidence was tendered, to show that the respondent company were, at the time of the charterparty being entered into, the undisclosed principals of Lundgren, and it was upon that application that the question now before the House arose.

My Lords, for the reasons I have already given I think it was rightly held both by Lush J. and by the Court of Appeal that evidence could be properly tendered to prove the agency of Lundgren when he originally entered into this charterparty.

I therefore move your Lordships that the appeal be dismissed and dismissed with costs.

(1) 12 Q. B. 310.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with what your Lordship on the Woolsack has said, subject to these two observations. I do not think that in this case I am called upon to express any opinion as to the decisions in *Humble* v. *Hunter* (1), or *Formby Brothers* v. *Formby*. (2) The time may arise when the principles of those two cases may have to be reviewed in this House.

My second observation is that I am not prepared to be held as in any sense agreeing with the decision arrived at by Rowlatt J. in *Rederiaktiebolaget Argonaut* v. *Hani*. (3)

With these observations, my Lords, I agree on the course proposed by your Lordships.

LORD SUMNER. My Lords, I concur. In my opinion this charter cannot be considered as containing a stipulation that no one but Lundgren shall have the rights and liabilities of a charterer under it. I cannot see that the words, "Wilh. R. Lundgren, of Gothenburg, Charterer," designate Lundgren as the real and only principal and as the only person who is to have a charterer's rights and obligations under the charter. The contract is on an ordinary printed form; there is a notice on the face of the document that Lundgren is manager of the line which the Rederiaktiebolaget carry on. Though this forms no part of the contract, the charterers' rights and obligations are in no instance inconsistent with their exercise or performance by Lundgren on behalf of undisclosed principals, especially as the principals, an incorporated company, must in any case act by some officer. Unless this contract is read as stipulating that Lundgren charters for himself only, the appellants fail. I think it cannot be so read. It states that Lundgren charters, and so he does; but it does not say that he is not chartering for others, and if that is what he has done in fact the law allows them to prove it. *Rederiaktiebolaget Argonaut* v. *Hani* (3) was a case in which the charterparty contained different words, namely, "as charterers," on which, rightly or wrongly, great stress is laid in the judgment, and I

(1) 12 Q. B. 310. (2) 102 L. T. 116.
(3) [1918] 2 K. B. 247.

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think it is distinguishable. *Humble* v. *Hunter* (1) and *Formby Brothers* v. *Formby* (2) were expressly decided as cases in which the contract itself, truly construed, excluded the application of the rule as to undisclosed principals. There is a clear distinction between words in a contract which can be construed as saying "A B, who prior to this contract was and who under it is and will be the single owner," and words which can only mean "A B, who by this contract becomes liable to the obligations and entitled to the rights, which this contract allots to the charterer." I think these cases are not in point.

That being so, I express no opinion at present about them. I do not see how the evidence objected to contradicts the contract. Lundgren as charterer, albeit on behalf of others, was personally liable to perform the obligations which the contract imposed on the charterers. The fact that he contracted for others was consistent with the contract, and evidence to prove it was admissible.

LORD WRENBURY. My Lords, I agree that the evidence is admissible. I think that Lush J. and the Court of Appeal were right, and that this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 12, 1918.

Solicitors for appellants: *J. A. & H. E. Farnfield.*
Solicitors for respondents: *William A. Crump & Sons.*

(1) 12 Q. B. 310. (2) 102 L. T. 116.

[PRIVY COUNCIL.]

J. C.*
1918
July 26.

In re SOUTHERN RHODESIA.

MATTER SPECIALLY REFERRED TO THE JUDICIAL COMMITTEE.

Constitutional Law—Chartered Company—Conquered Territory—Rights of Crown—Annexation—Administration by Company—Reimbursement of Expenditure.

A conquest of territory by the arms of a British chartered company is made on behalf of the Crown; it rests with the advisers of the Crown to determine how the territory shall be dealt with. A proclamation of annexation is not essential to constitute the Crown owner of the territory as completely as any sovereign can be owner of lands publici juris; a manifestation of the Crown's intention to that effect by Orders in Council dealing with the lands and their administration is sufficient for the purpose.

If the company administers the territory by the authority of the Crown, and in so doing expends its own money, the company is presumptively entitled to be reimbursed, either by a direct payment or in such manner as the circumstances indicate to have been the intention.

Observations as to the rights of aboriginal tribes in lands which they inhabit.

MATTER specially referred to the Judicial Committee by an Order in Council of June 16, 1914, under 3 & 4 Will. 4, c. 41, s. 4, for hearing and consideration.

On April 17, 1914, the Legislative Council of Southern Rhodesia passed a resolution relative to the ownership of such land in Southern Rhodesia as had not been alienated by the British South Africa Company. The contentions put forward by the resolution were disputed by the Company, and by an Order in Council dated July 16, 1914, there was referred to the Judicial Committee for hearing and consideration the question whether those contentions were well founded.

The terms of the resolution (pp. 229 and 230) and the circumstances under which the question arose appear from their Lordships' report, which also sufficiently indicates the arguments of the parties.

Counsel were heard on April 16, 17, 18, 19, 22, 23, 25, 26, 29,

* *Present:* EARL LOREBURN, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD SCOTT DICKSON.

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and May 2, 1916; the parties by agreement presented their cases in the order appearing below.

Clyde D.F., Sir Erle Richards K.C., Tredgold K.C., Sir Hamar Greenwood, Bart., and *Horace Douglas* for the British South Africa Company.

P. O. Lawrence K.C., Hon. F. Russell K.C., J. W. M. Holmes, and *Phear* for the elected members of the Council of Southern Rhodesia.

Leslie Scott K.C. and *Stuart Bevan* for the natives.

Sir Frederick Smith A.-G., Sir Gordon Hewart S.-G., Cunliffe K.C., and *Branson* for the Crown.

In the course of the arguments reference was made to *Campbell* v. *Hall* (1); *West Rand Central Gold Mining Co.* v. *The King* (2); *Rex* v. *Crewe* (*Earl*), *Ex parte Sekgome* (3); *Nireaha Tamaki* v. *Baker* (4); *St. Catherine's Milling and Lumber Co.* v. *The Queen* (5); *Attorney-General of British Columbia* v. *Attorney-General of Canada* (6); *Attorney-General for the Dominion* v. *Attorneys-General for the Provinces* (7); Hall's Foreign Jurisdiction of the British Crown, pt. 3, ch. 3; Westlake's Collected Papers on Public International Law, pp. 181, 182; Jenkyns' British Rule and Jurisdiction beyond the Seas (1902), pp. 192, 195; *Johnson* v. *M'Intosh* (8); *Worcester* v. *State of Georgia* (9); *United States* v. *Arredondo* (10); *Mitchel* v. *United States* (11); and Kent's Commentaries, vol. 3, pt. 6, lecture 51.

July 29. The report of their Lordships was delivered by

LORD SUMNER. In view of the unusual character and general importance of the questions involved in this reference, their Lordships will state, publicly and fully, their reasons for the report, which they propose humbly to lay before His Majesty. It will be convenient to give some account of the history of the matter before coming to the particular points in controversy.

(1) (1774) 1 Cowp. 204.
(2) [1905] 2 K. B. 391.
(3) [1910] 2 K. B. 576.
(4) [1901] A. C. 561.
(5) (1888) 14 App. Cas. 46.
(6) [1906] A. C. 552.
(7) [1898] A. C. 700, 709.
(8) (1823) 8 Wheat. 543.
(9) (1832) 6 Peters, 515.
(10) (1832) 6 Peters, 691.
(11) (1835) 9 Peters, 711.

Under ordinances and regulations having the force of law and with the approval and assent of the Crown, the Company—the British South Africa Company, to give it once for all its full title—has for many years past granted land and interests in land in Southern Rhodesia to numerous alienees. In a few cases it has purported to make grants to itself, but these may be disregarded. It is conceded, on the one hand, that by so doing it acquires and enjoys no further or better title than it had before, and, on the other hand, that under the Company's grants in their favour other parties acquire and enjoy a full and indefeasible title. There still remains unalienated a vast area of land, which consists partly of native reserves, partly of land in the Company's own occupation for ranching or other purposes, partly of country altogether waste and unsettled. It is to this area, known as "the unalienated lands," as to which the Company has never granted to others estates or interests therein, and so long as it does not so grant them, that the present case refers.

The Company was incorporated by Royal charter on October 29, 1889, and, in accordance with clause 25, a deed of settlement was subsequently executed, which further defined the objects and purposes of the Company. It was a commercial enterprise, but among its objects were the following: "To undertake and carry on the government or administration of any territories, districts, or places in Africa, and generally to exercise all rights and powers granted by or exercisable under the charter, and particularly to improve, develop, and cultivate any lands included within the territories of the Company, to settle any such territories and lands, and to aid and promote immigration, to grant lands for terms of years or in perpetuity, and either absolutely or by way of mortgage or otherwise."

It was provided further: "Article 101 (2.) the directors shall, as far as practicable, cause the accounts of the Company in relation to its African territories and property to be so kept that the cost of administration and police and the revenue, if any, derived therefrom shall appear separately from receipts in respect of commercial operations."

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There is no doubt that, from the first, of all the lands included within the territories of the Company, none were of more importance or of more immediate interest than what is now called Southern Rhodesia.

Before 1898 this country consisted of two regions, not very clearly distinguished from one another, called Matabeleland and Mashonaland, and of these countries in and before 1893 Lobengula was the paramount chief, as his father Umsiligas or Moselikatse had been before him. Both were chiefs or kings not so much of a determinate territory as of their peoples or tribes. Thus, in his treaty of friendship and alliance in 1836 with the then Governor of the Cape Colony, Umsiligas is described as "King of the Abaqua Zooloo or Qua Machoban," and the treaty of 1888 describes his son, Lobengula, as "ruler of the tribe known as Amandabele, together with the Mashona and the Makalaka, tributaries of the same." As a matter of right the relation of the Mashonas to the Matabele was perhaps ambiguous; as a matter of fact it was mere sufferance and subjection, but questions of this kind are now immaterial, for about 1888 Her Majesty Queen Victoria recognized Lobengula as sovereign of both peoples. The British Government stated to the Portuguese Government that he was "an independent king," "undisputed ruler over Matabeleland and Mashonaland," who had not parted with his sovereignty, though his territory was under British influence; and in 1889 the Colonial Secretary wrote to Lobengula himself saying that he, Lobengula, "is king of the country" (i.e., of Matabeleland), "and no one can exercise jurisdiction in it without his permission." Lobengula's sovereignty over what is now Southern Rhodesia is therefore the starting-point of the history of the land question there.

After a fashion Lobengula's was a regular government in which the actual rule was his. He assigned to individuals "gardens" for their personal cultivation. Under a system of short tillage and long fallows no occupation lasted long, except perhaps that of the kraals themselves, which he apparently respected. The community was tribally organized. It had passed beyond the purely nomad stage, though still

remaining fluid. It practised a rude agriculture, chiefly of mealies. Its wealth was mainly in cattle, and of that wealth the great bulk belonged to the king. What individual rights his subjects had is very doubtful.

No principle of legitimacy attached to the dynasty of Lobengula. Though he succeeded his father and left sons behind him, there was neither successor nor pretender to his throne. He had under him a kind of senate and a kind of popular assembly. He was expected to consult the council of indunas or chiefs in matters of moment. The assent of the assembled people added authority to his public acts, and to their resentment or superstition he sacrificed his indunas as evil counsellors or ministers.

Among all the peoples belonging to the Bantu stock, who at different times have inhabited various regions of South Africa, there have no doubt been similar institutions and similar ideas and practices on the subject among others of their tribal lands. Contact with white men and, still more, residence under their rule, have enlarged those ideas, and doubtless even in Lobengula's time there were races in South Africa, such as the Basutos for example, who had made considerable progress both in the idea of transferable property in tribal land and in usages for ensuring the assent of the tribe to alienation of it; but it does not appear that this was so with the Matabele, probably because of the isolation in which they lived: "When they were governed by their own customs and laws the notion of separate ownership in land or of the alienation of land by a chief or any one else was foreign to their ideas." (1)

It cannot be said of the Matabele and the Mashonas in Lobengula's day that they had progressed towards a settled policy further than this, that they acknowledged a sovereign in the person of a tyrant.

The present case, accordingly, raises no question of white settlement among aborigines destitute of any recognizable form of sovereignty. Equally little is there question of the

(1) Per Innes C.J. in *Hermansberg Mission Society* v. *Commissioner for Native Affairs* [1906] T. S. 135, 142.

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rights attaching to civilized nations, who claim title by original discovery or in virtue of their occupation of coastal regions, backed by an unexplored interior. On the other hand, it would be idle to ignore the fact that, between the subjects of Her Majesty Queen Victoria and those of this native monarch, whose sovereignty she was pleased to recognize, there was in all juridical conceptions a great gulf fixed, which it would, perhaps, be only fanciful to try to span.

Matabeleland and Mashonaland chiefly lay on the high interior plateau of South Africa. The latter, at any rate, was well watered, but both were cut off from the sea and from white settlements by belts of unhealthy coast lands or by great tracts of arid and almost waterless country. They had been visited and explored for years by missionaries and by hunters and by traders, but they were served by no navigable highway, and communication with them by ox wagon was tedious, hazardous, and slow. They had been to some extent prospected for minerals, and even before 1889 it had become manifest that the savage solitude in which the Matabele people lived could not long endure. As early as 1880 and 1882, to pass over previous concessions which came to nothing, Lobengula had granted mining concessions between the Ramaquaban and Shashi rivers to predecessors in interest of the Tati Company. In 1888 the Assistant Commissioner stationed in Matabeleland reports, "There is quite a crowd of Europeans here at present and the chief does not know which way to turn"; and on December 5 the High Commissioner, transmitting to the Colonial Secretary a copy of a mining concession (1) granted by Lobengula to Mr. C. D. Rudd, observes: "The rush of concession hunters to Matabeleland has . . . . produced a condition of affairs dangerous to the peace of the country. I trust, therefore, that the effect of this concession to a gentleman of character and financial standing will be to check the inroad of adventurers as well as to secure the cautious development of the country with a proper consideration for the feelings and prejudices of the natives."

(1) Dated October 30, 1888.

It was under these circumstances that the Company commenced operations. The Imperial Government desired to avoid the scandal and disorder to which a scramble for the natural resources of the country would lead unless the white immigrants were placed under effective control, and to secure the aboriginal inhabitants in the conditions necessary to their tribal mode of life, until they should have become adapted to take their place in a civilized community. If this could be done without undertaking direct administrative responsibility, so much the better. On the other hand, those who had petitioned for the grant of the charter to the Company were influenced by patriotism as much as by profit, and desired to further the development of British South Africa consistently with Imperial policy and progress. Lobengula for his part was perturbed by the solicitations of the white suitors, who crowded round him, bearing gifts, to the value of which he was keenly alive, and pressing him for concessions, the nature of which he but dimly understood. As for his people, they were uncomprehending but apprehensive spectators.

The charter was granted in terms carefully adapted to meet this situation. The Colonial Secretary was influenced by the consideration that "if such a Company is incorporated by Royal charter, its constitution, objects, and operations will become more directly subject to control by Her Majesty's Government than if it were left to these gentlemen to incorporate themselves under the Joint Stock Companies Acts, as they are entitled to do. In the latter case Her Majesty's Government would not be able effectually to prevent the Company from taking its own line of policy, which might possibly result in complications with native chiefs and others, necessitating military expenditure and perhaps even military operations."

Accordingly the field of the Company's operations was so defined that while the existing protectorate south of 22 degrees south latitude remained unaffected, beyond that boundary the Company was empowered to acquire from the lawful rulers (subject to the approval of the Secretary of State)

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certain powers of government or administration, and by clause 33 a "novel principle" was introduced by which the administrative and public portion of the charter was made terminable at the end of twenty-five years, with a provision for shorter renewals, a provision which "precludes any objection, which might otherwise be made, that the grant of a charter locks up indefinitely a large portion of South Africa in the hands of a commercial association." Approval was given to the Company's acquisition of the Rudd concession, a concession from Lobengula of the exclusive right to minerals throughout his entire territory, but warning was expressly given that "whenever the Company thinks it necessary that there should be an armed police force in Lobengula's country, or elsewhere beyond the Protectorate, it will be proper that it should organize its own police . . . . but it will, of course, be very important before introducing such a force into Matabeleland, whether in order to maintain the rights conferred by the concession granted to Mr. Rudd and others or for any other lawful purpose, to ascertain clearly that its presence there will be acceptable to Lobengula. . . . . The Company no doubt understands that the concession above referred to does not confer such powers of government or administration as are mentioned in clauses 3 and 4 of the charter. These powers will have to be obtained whenever a proper and favourable time for approaching Lobengula on the subject arrives."

About two years afterwards (1) Lobengula granted another concession, which recited as follows: "Whereas I have granted a concession in respect of mineral rights and the rights incidental to mining only . . . . and whereas large numbers of white people are coming into my territories, and it is desirable I should assign land to them, and whereas it is desirable that I should once and for all appoint some persons to act for me in these respects"; and then proceeded to grant to Edward Amandus Lippert the exclusive right "to lay out, grant, or lease, for such period or periods as he may think fit, farms, townships, building plots, or grazing areas."

(1) November 17, 1891.

Now Herr Lippert was a German financier from Johannesburg, and he did not represent the group which was principally interested in the Company. This concession was assignable, a feature which probably constituted its chief value in Herr Lippert's eyes. At any rate, it was not long before the Company bought it—at what price does not now matter.

Meantime, in the middle of 1890, and with the consent of the High Commissioner for South Africa, the Company sent a pioneer force to occupy Mashonaland. Their goal was some 1700 miles from the southern coasts. They marched on foot for 1000 miles, of which 400 were through dense forest, where their road had to be cut day by day. They arrived at their destination to find that, when the rains fell and the rivers rose and the drifts were closed, they were prisoners in the promised land, and such was the cost of transport that food rose to 70*l.* a ton. Thus it was plain from the outset that if Mashonaland was to be developed for white settlement a great mileage of communications of all kinds, roads, bridges, telegraphs, and ultimately railways, would be necessary, and that only after this had been proceeded with could any considerable number of white settlers be found or any land revenues worth mention be gathered in. Land grants were, however, promised to the pioneers, and in many cases were applied for. Power was given to the High Commissioner by Order in Council, dated May 9, 1891, to exercise in Mashonaland, among other regions, "all powers and jurisdiction which Her Majesty, at any time before or after the date of this Order, had or may have within the limits of this Order, and particularly from time to time by Proclamation to provide for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of all persons within the limits of this Order."

The Proclamation under which the High Commissioner exercised these powers generally was dated June 10, 1891. Three articles in this Proclamation need particular mention :—

"Art. 43. No occupation or ownership . . . . by any person of European birth or descent in respect of any land within the limits of the said Order, and no concession or grant of

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any right, title or privilege to deal with or authorize the occupation or ownership of any such land shall be recognized as valid or legal until approved in such mode as the High Commissioner shall appoint.

"Art. 45. No concession or grant heretofore or hereafter made by any native chief . . . . and no . . . . document of procuration heretofore or hereafter granted by any such chief coupled with an interest in favour of some other person . . . . shall be recognized by any Court of law unless and until sanctioned and approved by Her Majesty's Secretary of State.

"Art. 46. Nothing in this Proclamation contained shall be deemed in any wise to abridge or impair the powers, privileges, authorities or jurisdiction of the High Commissioner or of the British South Africa Company."

By a separate Proclamation, dated June 27, 1891, magistrates were appointed to exercise jurisdiction respectively at Fort Victoria, Fort Salisbury, Hartley Hill, and Umtali, and in due course the Secretary of State signified his approval of both the Rudd and the Lippert concessions. The Company, under its powers, made regulations as to arms and liquor, police, and weights and measures, appropriate to a nascent settlement.

It was not long before the Administration thus established, resting on the assumption of jurisdiction by the Crown within the territorial sovereignty of a native ruler, and yet subject to the recognition of his rights as such, was no longer suitable to the condition of the country. The Matabele natives were wont to attack and massacre their neighbours from time to time, and impis, or bodies of warriors, more or less disciplined and sometimes numbering thousands, were sent out by the King for this purpose. They raided Lomagunda early in the year 1892, and later sundry kraals in the direction of Tuli. In 1893, although 6000 Matabele were absent on the warpath in the Barotse country, an impi was despatched against the Mashonas; it surrounded and penetrated the Company's settlement at Victoria, murdered many Mashonas, and threatened the white settlers. A collision followed, and operations against Buluwayo were undertaken. The Company

raised a force, and when it approached Buluwayo, Lobengula, with a large body of Matabele, withdrew north-westward toward the Bubye river in November. If any settlement was to be effected, his capture or his expulsion from the country was necessary, for the Matabele people would not come in till they knew that there was no chance of his return to punish them for their surrender. Negotiations were useless. For some time his intentions and even his whereabouts were unknown. According to the evidence of his brother-in-law, Ingubugubu, he attempted to settle on the Shangani river and then fled again. At last, in February, 1894, trustworthy news came in that he had died in January of fever or small-pox, and this is the last that ever was heard of him. King Lobengula's kingdom perished with him. Probably he and his power were unregretted by the Matabele; it is certain that, as a result of his defeat and flight, where he had formerly reigned an undisputed monarch, there was now no longer any sovereign left. It has been suggested that these operations were not really war, nor was their result a conquest; that truly speaking, the Company simply restored order, which for the moment he had disturbed, stepped into his vacant place, as the leading inhabitant of all those regions, and discharged the royal functions, which he had abandoned, in the interest of peace, order, and good government. This argument is fanciful. Before Lobengula fled the white forces had fought three battles, one against an impi of 5000 and the others against impis of 7000 or 8000 men. To those who recalled Isandula, fought not many years before, or the history of the earlier wars, which had driven Lobengula's father out of the Transvaal, the Matabele warriors were no mean foes. Not only were the Company's arms engaged, but also Crown forces, namely, the Bechuanaland Border Police. Those who knew the facts at the time did not hesitate to speak, and rightly so, of conquest, and if there was a conquest by the Company's arms, then, by well-settled constitutional practice, that conquest was on behalf of the Crown. It rested with Her Majesty's advisers to say what should be done with it.

Comparing 1891 with 1894 a great change had occurred.

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In 1891 the Company, deriving from its charter capacity to administer and govern, and from the Crown permission to do so, subject to the Crown's directions, could only seek the source of its actual administration in the governing sovereign of the country, King Lobengula. In 1894 there was no native sovereignty under which it could exercise administration. Yet there was no change in the predominant objects either of the Crown or of the Company. The Crown was more than ever anxious to assure to the natives, now left without any political headship, security and prosperity under new conditions and new influences. In respect of the external relations of the country its policy was unaltered. The Company had made a beginning of white settlement under Lobengula's régime and was loyally anxious to continue it under whatever new régime the Crown might be advised to establish. In law the difference was crucial, and everybody saw that a new chapter had opened for Matabeleland and Mashonaland. As the Colonial Office wrote to the Company on November 4, 1893 : " Correspondence has hitherto proceeded upon the supposition that at the close of hostilities it would be practicable to open negotiations with Lobengula in his capacity of king, and to come to a settlement with him as representing the Matabele people. But the circumstances have now, to all appearances, materially altered, owing to the success achieved by the forces of the British South Africa Company, which has apparently resulted in the defeat of Lobengula and the destruction of his power. It seems therefore probable that, when the hostilities come to an end, there will be no responsible chief left on the Matabele side with whom negotiations for a durable settlement could be entered upon with advantage ; and it remains for Her Majesty's Government to consider in what manner the pacification and future government of the country can be best brought about."

A period intervened in the early part of 1894 when all arrangements were provisional pending discussion of the new settlement. Mr. Rhodes, addressing the volunteers at Buluwayo on December 19, 1893, said : " It is agreed that the High Commissioner and myself should discuss the whole of the

future mode of settlement to be hereafter decided upon. There will probably be reserves for natives, and the remainder will be what I might call public land, so that you will be the first entitled to select land. . . . . There will be thus native reserves, free grants to yourselves, and the balance of Crown land, not to be sold under 3*s.* per morgen. . . . . All these arrangements with regard to the settlement are subject to approval of the High Commissioner, and that is one of the principal reasons why I am hurrying down to Cape Town to confer with him."

On December 29 the High Commissioner telegraphed to the Marquess of Ripon: "No Government is established in Matabeleland beyond what may be necessary to maintain order. There is no present extension of the Government of Mashonaland to Matabeleland. There is no appropriation of land. These questions are all dependent on future arrangements to be discussed between myself and Mr. Rhodes, and approved by Her Majesty's Government."

The conversations between the High Commissioner and Mr. Rhodes, who since May 4, 1890, had held the Company's power of attorney in South Africa, were reported to the Colonial Office. In the result an agreement was entered into between Her Majesty's Government and the Company, dated May 23, 1894, signed by the High Commissioner and sealed with the Company's seal, and effect was given to its provisions in the Matabeleland Order in Council of July 18, 1894. The first twenty-three clauses of the agreement applied to Mashonaland as well as to Matabeleland. Provision was made for the conduct of the administration by the Company under an Administrator and a Council of four; for a judge and resident magistrates; for legislation by Ordinances, including Ordinances for taxation, direct and indirect. The Administrator, the judge, and the members of Council were to be appointed by the Company with the approval of the Secretary of State, and the salaries of the Administrator and the judge were to be paid by the Company. Then followed provisions relating to Matabeleland only. A "Land Commission" was to be appointed to deal with all questions as to native settlements,

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which was to "assign to the natives now inhabiting the said portion (i.e., Matabeleland) land sufficient and suitable for their agricultural and grazing requirements and cattle sufficient for their needs," the Company retaining "the mineral rights in, over, and under all land so assigned to natives." The Matabeleland Order in Council, 1894, gave effect to these provisions, and particularly par. 7 ran: "The Company shall have and may exercise the general administration of affairs within the limits of this Order" (which included both Matabeleland and Mashonaland); and by par. 26 it was provided that "there shall be a Court of record, styled the High Court of Matabeleland, with full jurisdiction, civil and criminal, over all persons and over all matters within the limits of this Order," which was to administer the law of the Cape Colony in general. Where natives were in litigation with one another native law was to apply, so far as it was not repugnant to natural justice or to morality or to any Order in Council, Proclamation, or Ordinance.

A despatch from the Marquess of Ripon to the Acting High Commissioner, dated the day after this agreement was signed, states its nature and effect and the view of Her Majesty's Government so exactly that it is well to quote it in full. It referred first to a speech in the House of Commons by the Under-Secretary for the Colonies, in which, expressing "the general views of Her Majesty's Government," he had said: "In the charter no distinction is made between Matabeleland and Mashonaland, the latter being already practically occupied and governed by the Company. Nor can the point be ignored that the mining and land concessions held by the Company are applicable to Matabeleland as well as to Mashonaland, i.e., to the whole territory claimed by Lobengula. We must also bear in mind that the greater part of the operations now proceeding have been undertaken on the responsibility and at the expense of the Company."

The Colonial Secretary proceeded to say that Her Majesty's Government "came to the conclusion that under the existing circumstances there were serious objections to the creation of a Crown Colony in that region, or to placing Matabeleland

under the direct administration of the High Commissioner. They determined, therefore, to avail themselves of the machinery at work in Mashonaland under the charter of the British South Africa Company and Her Majesty's Order in Council of May 9, 1891, and to extend the existing system, with such modifications as might be considered necessary, to that part of the country known as Matabeleland. They considered it essential, however, with a view to securities for good government, that the powers of guidance and control vested in the Imperial Government by the provisions of the charter and under the Order in Council should be exercised somewhat more fully than heretofore over the actions of the Company throughout their administrative area, especially in regard to the rights of and protection over the natives. . . . . Her Majesty's Government . . . . have finally decided on a scheme for the future administration of Mashonaland and Matabeleland, of which a copy is enclosed." (This was the above-mentioned agreement.) "This scheme, in which the substance of Sir H. Loch's proposal is embodied, has been agreed to by the British South Africa Company. . . . . The new scheme of administration does not purport to supersede Her Majesty's Order in Council of May 9, 1891, or the British South Africa Company's charter of October 29, 1889, but should be read in connection with those instruments as containing a development and reform of the existing scheme of administration."

The settlement of 1894 is of capital importance, because the rights and the system under which Southern Rhodesia has been since administered were in all essentials settled then. The Administrator published Survey Regulations in April, 1894, and a Registry of Deeds was established in May. The first paragraph of the Survey Regulations provided that any person entitled to receive a grant of land (which referred, inter alia, to pioneer and police grants, and to the rights of the Matabeleland volunteers) might obtain a provisional title deed on making application to the Company. In connection with surveying and delimiting lands there were provisions for the service of notices on adjoining "owners,"

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and for other proceedings by or in relation to them, and par. 27 provided that "for the purposes of these regulations the Administrator shall be deemed and taken to be an owner with regard to vacant or unallotted lands, and also with regard to native reserves." Next year the High Commissioner approved certain amending regulations, introduced "to remove all doubts alleged to have arisen with respect to the validity of acts done under and by virtue of the Survey Regulations of 1894," which provided that judicial notice should be taken of the said Survey Regulations and all acts done thereunder should be deemed and be taken to have been lawfully done, and that all unsurveyed land, held under grant from the Company, should be deemed to be held subject to the terms and conditions in those regulations. Further amended regulations were approved in 1898, and in adapting to Southern Rhodesia Survey Regulations in force in the Cape Colony it was provided that for "Crown lands," the expression therein employed in antithesis to private property, there should be read in Southern Rhodesia "British South Africa Company's land." In other regulations and documents similar expressions were used. On several occasions the attention of the Colonial Office was drawn to the subject of the ownership of unoccupied land in these parts of South Africa. Thus, in 1894 the Tati Concession Mining and Exploration Company, Limited, claimed to own all the land in its territory, and, in reporting to the High Commissioner, the Land Commission, constituted under the Matabeleland Order in Council of 1894, observes: "'The Commission presumes from the terms of the Order in Council that all lands assigned by it for the occupation of natives are to be considered as 'Crown lands,' but for the sake of removing any doubt which may exist it is of opinion that the ownership therein should be declared to be vested in the British South Africa Company."

It does not appear, however, that, except in so far as the amended Survey Regulations of 1895 may deal with the subject, anything was done to declare definitely how this matter stood. In November of that year correspondence took place between the Company and the Colonial Office as to the strip of land

along the eastern border of the Bechuanaland Protectorate, called the "railway strip," which was given up by the chiefs Bathoen, Khama, and Sebele for the construction of a railway to Buluwayo. As to this the Secretary of State instructed the High Commissioner that the Company "can consider itself owner of so much of the strip as has hitherto belonged to the three chiefs," and that the settlement with the Company "will include acquisition by them of title of land given up by Khama, Sebele, and Bathoen," but, when the Company itself wrote that it understood this land was to be "vested" in the Company, Mr. Chamberlain's reply was that, as the three chiefs had verbally abandoned their lands in the railway strip to the Government, he authorized the Company to take possession of them, and considered that "a transfer of any part of them by the Company would confer a good title," and there it was left.

The administration of Southern Rhodesia involved heavy cost. As must have been foreseen all along, the construction of roads, bridges, telegraphs, and railways was highly necessary and could not but be expensive, while no adequate return for this outlay could be expected for a considerable time. It is not contested that there has been all along a deficit on administrative account in Southern Rhodesia, which the Company has had to meet from its own resources, and that the accumulation of annual debit balances now amounts to a large sum. How this sum is made up is not material to the present inquiry.

For several years the published accounts of the Company did not distinguish between sums received as consideration for, or in connection with, the alienation of lands and other revenue, such as telegraph receipts, auction duty, and judicial fines collected in the course of administration. In 1896 the Secretary of State drew attention to the terms of art. 17 of the charter, which required the Company to furnish before the commencement of each financial year an estimate for the ensuing year of its expenditure for administrative purposes and of its public revenue, and added: "The Company is not itself engaged in mining operations, nor does it engage in

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trade in any larger sense than Colonial Governments ordinarily do, which sell State property and produce, work railways and steamboats, or render services to the community, such as those of posts and telegraphs, which cannot properly be regarded as commercial undertakings. Mr. Chamberlain considers that in these altered circumstances all the receipts of the Company would properly appear on the revenue side of their estimates and accounts."

The Company did not challenge this, and after considerable delay, largely unavoidable, rendered accounts in purported compliance with this request, to which the Colonial Office took no exception. More has been made of this point and of the Company's conduct in regard to the form of its accounts at different times than they really deserve. What was done cannot be regarded either as an abandonment of its rights in the matter, if any, or as the foundation of a new right, if none theretofore existed. Mere erroneous acquiescence by the first party in the view of his rights asserted by the second neither extinguishes title in the one nor creates it in the other.

After the suppression of the Mashona rising of 1896 Her Majesty's Government took up the question of rendering more effective the machinery for the control of the Company's administration by the Crown, and eventually, in October, 1898, "The Southern Rhodesia Order in Council, 1898," was made. This Order applied both to Matabeleland and to Mashonaland. It provided for the creation of a Legislative Council consisting of nominated members and elected members. One limitation on the powers of the Council should be quoted: "No fiscal vote or resolution shall be proposed in the said Council except by the Administrator acting on the instructions of the Company, or by his authority in writing previously obtained."

This Order superseded the Matabeleland Order in Council of 1894, but, apart from the creation of a Legislative Council, it generally followed the same lines with various extensions and supplementary provisions. It required the annual publication of detailed statements of the revenue and expenditure of Southern Rhodesia, and an annual audit of the accounts

of the Company relating to all sums received and moneys expended by the Company in connection with the administration of Southern Rhodesia. From the supplementary Southern Rhodesia Order in Council, 1911, there need only be quoted two articles: "6. The Legislative Council shall not consider any vote, resolution, or Ordinance for the appropriation of any part of the public revenue or for any tax or impost that has not been first recommended to the Council by the Administrator during the same session. 7. Ordinances interfering with the land and other rights of the Company shall not be proceeded with except with the consent of the Administrator."

The Legislative Council was duly brought into existence and soon showed an active interest in the country's affairs. In 1902 the contention was raised in the course of its debates that the Company, "admitting for the moment for the sake of argument, but not otherwise, that it was the owner of the land in this country and the minerals under the ground," ought, as an administrative body, to tax itself as a commercial body "in proportion to the property and interests which the said Company has in this territory." Here began the present controversy. In the face of doubts and contentions thus raised the Company proceeded to remodel its annual estimates and accounts by excluding proceeds of land sales and other such receipts from its estimate of its administrative revenue. Presumably it regarded them as being in the same position as consideration received for the grant of mining rights, and carried them to its private commercial account. Eventually on April 17, 1914, the Legislative Council of Southern Rhodesia passed a resolution as follows:

"(1.) That the ownership of the unalienated land in Southern Rhodesia is not vested in, and has never been acquired by, the British South Africa Company as their commercial or private property, and that such powers of taking possession of, dealing with or disposing of land in Southern Rhodesia as have been or are possessed by the British South Africa Company have been created by virtue of authority conferred by Her Majesty the Queen in Council and her successors upon the Company, as the governing body charged for the time

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being by Her Majesty in Council and her successors with the general administration of affairs within the said territory and responsible for the maintenance of law, order, and good government therein :

"(2.) That if by the exercise of the said powers and the taking possession of, dealing with and disposing of the said land or by any other means, the British South Africa Company have acquired an ownership of the said land, such ownership is so vested in them as an administrative and public asset only, and the Company in their capacity other than a Government and Administration have no dominion or estate in or title to the said lands or to any moneys or revenues derived therefrom.

"(3.) That on the said Company ceasing to be the Government of the said territory, and ceasing to exercise the administration of affairs therein, all such lands as may be unalienated at such time shall be and remain the property of the Government of the said territory which shall take the place of the said Company, and the possession and administration of such land shall pass to such Government as public domain."

These contentions were disputed by the British South Africa Company, and by Order in Council, dated July 16, 1914, His Majesty was graciously pleased to refer to this Board for hearing and consideration the question "whether the contentions put forward in the said resolution of April 17, 1914, are well founded?" Their Lordships' jurisdiction in such matters arises under s. 4 of the Judicial Committee Act, 1833.

Counsel have been heard on behalf of the Company, of the elected members of the Legislative Council and of the natives respectively of Southern Rhodesia, and, finally, of the Crown. The Company is in possession of the unalienated lands, but, as this is not an action of ejectment or a controversy depending upon the onus of proof, possession alone does not avail. The case raises positive questions as to ownership, and if their Lordships are not satisfied that the unalienated lands are the property of the Company it is their duty to say so. They have to ascertain what the Company's rights

are in order to decide whether or not they amount to ownership.

The rights of the Crown again, on behalf of whom the Attorney-General asked for a positive declaration of right, are equally matters of proof. Theoretically it is possible to say that the unalienated lands do not belong to anybody, but this conclusion would be unreal, for the whole administrative policy and legislative system of rights in Southern Rhodesia rests on grants from the Company entered on a public register by way of solemn recognition and record of title of ownership. In a sense the Crown's position is residuary, for if these lands are not shown to belong to any private owner, the practical conclusion would seem to be that they are the Crown's, but here, too, unless it can be made to appear how and why they are the Crown's, the question of ownership cannot properly be answered in the Crown's favour.

The case of the elected members is in great measure identical with that of the Crown. In so far as they traverse the Company's case and dispute its rights, their contentions differ from those of the Crown in immaterial respects. In one point they are at issue with the Crown. They contend that the unalienated lands are the property of the Crown and not of the Company, but that even the Crown's power of dealing with them is now limited. With far-sighted care for the interests of unborn generations they urge that these lands are really an endowment for the future of Southern Rhodesia, and that if and when the Company's administration comes to an end the possession and disposition of the lands will not revert to the Crown, but that the Company's successors in the administration will ipso facto be entitled to the lands then remaining unalienated as administrative assets for the country's benefit. This involves the proposition that, by some action or course of events which binds the Crown, these lands have already been disposed of, prospectively but definitively, so that the Company's successor in the administration, though newly appointed by direct commission from the Crown at its pleasure, would receive the lands, not directly from the Crown, but by succession to the Company. Such a case

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would be singular, for in general an administrator, when he resigns his commission to the Crown, surrenders with it the property which he has been commissioned to administer. No such action or event was indicated, and this part of the case was only faintly urged. Their Lordships think it sufficient to say that, except in so far, if at all, as the rights of the Crown are subject to those of the natives and the Company, nothing has been shown to have happened or to have been done that would prevent the Crown, if and when the Company's tenure of the administration of Southern Rhodesia determines, from disposing of the lands then remaining unalienated by any lawful means and in favour of any persons or purposes as it may duly be advised.

By the disinterested liberality of persons in this country their Lordships had the advantage of hearing the case for the natives who were themselves incapable of urging, and perhaps unconscious of possessing, any case at all. Undoubtedly this inquiry has thereby been rendered more complete. Although negative in form, since their case in answer to the questions mentioned in the order of reference was primarily that the unalienated lands were the property neither of the Crown nor of the Company, in substance their case was that they were the owners of the unalienated lands long before either the Company or the Crown became concerned with them and from time immemorial, that their title could not be divested without legislation, which had never been passed, or their own consent, which had never been given, and that the unalienated lands belonged to them still. Hence, if the Company had any title at all, which was denied, it was only the title of a trustee, the beneficial interest remaining in the natives and the legal title and right to possession reverting to them whenever the Company ceases to govern the country.

The evidence by which this case was supported was respectable but slender. The exigencies of the war had curtailed the collection of further materials in South Africa, but it is by no means certain that in any event any such could have been found. Their Lordships were invited to undertake or to direct some further inquiry at a future date

and under happier circumstances, but what power they were supposed to have for that purpose or how this reference could be adjourned or provisionally disposed of pending such inquiry did not appear. As the argument stood it was really matter of conjecture to say what the rights of the original "natives" were and who the present "natives" are, who claim to be their successors in those rights.

Between 1893 and 1914 there has undoubtedly been much migration, emigration, and immigration of natives in Southern Rhodesia, and the aborigines of Lobengula's time have both changed and been scattered. It was said that the rights of the Matabele did not extend beyond a radius of sixty miles from Buluwayo, and that beyond that the Mashonas were the race entitled. Whether the Matabele or the Mashonas of to-day are, in any sense consistent with the transmission or descent of rights of property, identical with the Matabele or the Mashonas of more than twenty years ago is far from clear, and the fate of the Makalakas and the Maholies, once the slaves of Lobengula, is as obscure as their original rights. Lobengula was called a trustee of the lands for his people, an expression convenient and often used, but in this connection altogether lacking in precision, and his right to alienate them was denied without the consent of his people in pitso assembled. It seems to be common ground that the ownership of the lands was "tribal" or "communal," but what precisely that means remains to be ascertained. In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some

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shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe." On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit. Lobengula's duties, if describable as those of a trustee, were duties of imperfect obligation. Except by fear or force he could not be made amenable. He was the father of his people, but his people may have had no more definite rights than if they had been the natural offspring of their chieftain. According to the argument the natives before 1893 were owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveller, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council.

This fact makes further inquiry into the nature of the native rights unnecessary. If they were not in the nature of private rights, they were at the disposal of the Crown when Lobengula fled and his dominions were conquered; if they were, any actual disposition of them by the Crown upon a conquest, whether immediately in 1894 or four years later, would suffice to extinguish them as manifesting an intention expressly to exercise the right to do so. The Matabeleland Order in Council of 1894 and the Southern Rhodesia Order in Council of 1898 provided for native reserves, within which

the tribal life of the natives might be continued under protection and control, and to the rest of the country the Company's officers and white men were admitted independently of any consent of the natives. The Company's alienations by grant are unquestionably valid, yet the natives have no share in them. The ownership of the reserves was, at least administratively, vested in the Company under the Southern Rhodesian Native Regulations promulgated by the High Commissioner in 1898, and with the consent of the Crown other dispositions of those reserves can be made by the Company from time to time. By the will of the Crown and in exercise of its rights the old state of things, whatever its exact nature, as it was before 1893, has passed away and another and, as their Lordships do not doubt, a better has been established in lieu of it. Whoever now owns the unalienated lands, the natives do not.

Like the natives, the Company desired to find a title which would ante-date the conquest of Lobengula in 1893 and would confer such prior rights in property, or rights equivalent to property, in the unalienated lands as would be classed among the private rights which a conquerer is deemed to respect, unless by appropriate action or legislation he expressly affects them. For ten years after 1893 the Lippert concession is little heard of, but it was a grant from Lobengula while he was still sovereign of the country, and it referred to the lands generally. Accordingly it formed a part, and not an unimportant part, of the Company's case.

The Lippert concession was not one of those public acts by which one independent sovereign, however humble, enters into political relations with the agents of another. Instruments of that character have been common enough in the history of the British Empire. They derive their juridical character from their recognition and adoption by the Crown, and in interpreting them it must be borne in mind that they are State documents. The Lippert concession is not of this character. Like the Rudd concession, it received the approval of the High Commissioner on behalf of the Crown, but it is essentially a private contract though entered into by the concessionnaire with the paramount chief, and, like other

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legal documents, its effect must depend upon the construction of its terms according to ordinary legal rules. It is, indeed, of importance to the Company's case largely because it confers private rights, and is not in any sense a mere public act or act of State. Private concessions of large extent and of ambitious character, when obtained by white financiers from untutored aborigines, are generally and justly objects of close scrutiny, but their Lordships are relieved from the duty of inquiring into the circumstances under which this grant was made by the fact that competent officials reported to the High Commissioner, after making full inquiry under his direction, that the concession had been properly obtained and that its terms correctly expressed Lobengula's intentions and exactly reflected his understanding of the matter. This is a testimony to his enlightenment and acumen, which perhaps goes beyond what might have been supposed. It is still right not to leave out of account the known character of the King and his subjects, but there need be no hesitation about examining the language used in limiting the area and nature of the rights granted by the terms of the instrument, read in their substantial if not in their technical meaning. The Company did, indeed, contend for a canon of construction alike novel and singular. Lobengula, it was said, had granted to Herr Lippert the right to allot the land to others and to take money in return ; to dispose of the surface for 100 years without being called to account ; to do all that an owner could do and make out of it all that an owner could make. Thus he granted to him all the right of dealing with land of which he had any knowledge, and his ignorance of the nature of an estate in fee ought not to derogate from the amplitude of a grant, which was as wide as he knew how to make it. He reserved, at any rate, nothing but money considerations for himself, and when the Lippert and the Rudd concessions fell into the same hands the King had, in substance, sold his country out and out to the Company. Their Lordships cannot accept this argument. As well might it be said that a savage who sold ten bullocks, being the highest number up to which he knew how to count, had thereby sold his whole

herd, numbering, in fact, many hundreds. In the questions referred to the Board ownership and property mean ownership and property as civilized people understand these words. They cannot be satisfied by any such general right of disposal as is here suggested. Their Lordships think that the real question is, what does the Lippert concession say ?

Thus read, it is plain that the concession did not give the concessionnaire the right to use the land or to take the usufruct. It did not make any land his, nor did it enable him to make it his own. What land he appropriated to others was to be appropriated in Lobengula's name. There were no words of conveyance—no estate or interest in land was vested in Herr Lippert. The concession was at most a personal contract. If it bound Lobengula's successors, they were such successors only as came to his throne under his title, and not successors to his sovereignty who came to it by right of the sword. If Lobengula broke the contract or revoked the concession, Herr Lippert's claim was a personal one, and was not supported by any right in or to the land. The Company, indeed, never acted under the concession. Its grants were not made in Lobengula's name, nor did it pay the annual douceur, upon which the rights under it were conditional. The consequences of the construction which the Company puts on the document would indeed be extreme. It would follow that Herr Lippert was, or could become at pleasure, owner of the entire kingdom—for nothing is reserved in favour of the inhabitants —from the kraals of the King's wives to his father's grave or the scene of assembly of his indunas and his pitso. Thenceforward the entire tribe were sojourners on sufferance where they had ranged in arms, dependent on the good nature of this stranger from Johannesburg even for gardens in which to grow their mealies and pastures on which to graze their cattle. The Lippert concession may have some value as helping to explain how and why the Crown came to confer the administration of Southern Rhodesia upon the Company, but as a title deed to the unalienated lands it is valueless. Accordingly it becomes unnecessary to consider either the powers of Lobengula to dispose of tribal lands or the effect

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of the approval and recognition of the concession by the Crown and of the occupation which it is suggested that the Company enjoyed under it. The Crown recognized the concession for what it might be worth on its true interpretation, and the Company's occupation, whatever it rested on, did not rest on the Lippert concession. Recognition could give no title where none existed already. It is true that sundry speeches to shareholders, wise and otherwise, were quoted in which the Company claimed to own the whole country, though the Lippert concession was but little relied on and but rarely mentioned; but, though these were sent to the Colonial Office, it is not shown that they were or ought to have been read there, or that, if they were read, the Crown was bound to take any notice of these domestic matters.

In default of the Lippert concession the Company places great reliance on occupation long standing and undisturbed. It is true that the period required for a title by prescription under Roman-Dutch law, which has been applied to Southern Rhodesia, has not yet elapsed, and that the Company's possession has not been held adversely to the Crown. Laying aside the language of directors' speeches and the form of the Company's accounts because of their ambiguity, no one can say that its possession is not at least as referable to the administrative position which it held under the Crown as to an enjoyment independent of the Crown, or that it is inconsistent with the recognition of the Crown's overriding title. The fact of occupation is, however, relied on in various ways. It commenced, at any rate in Mashonaland, before 1893. The Company does not (nor could it do so) assert a conquest for its own benefit, but it says that, enjoying certain rights under its charter, it occupied extensive tracts of country without objection from Lobengula during his reign, and then, after his flight and on a still larger scale, it took to itself the disposal of a masterless land, now left vacant for the first comer who should prove strong enough to hold what he took. Thenceforward, with the recognition of the Crown, or at least without its dissent, the Company claims that it did openly all that an owner could do, and enjoyed every advantage that ownership

could have given, conveying land in its own name to grantees of its own choice, fixing the price and applying the purchase-money as it saw fit, and consistently doing what only an owner ought to do, under the very eyes of the Crown, and in a manner which cannot be reconciled with any title outstanding in the Crown. Thus, if the Crown did not give the land into the Company's hands, yet it was content to leave in the Company's hands all that it found there. The word "estoppel" was not, indeed, used, but the Company did not scruple to suggest that, if after all its expenditure in Southern Rhodesia, incurred in the belief that it was undisputed owner of the unalienated lands, the Crown succeeds in asserting a competing title, then it has not been fairly dealt with.

The questions in this reference refer to property and not to mere occupation. This must never be lost sight of. The charter simply gave capacity to own and to grant land, but in itself it granted none. It used, indeed, the expression "the Company's territories," but this referred to the area within which those capacities might be exercised, and did not amount to an anticipatory grant by the Crown of land which in 1889 was not the Crown's to bestow. The fact of occupation and especially the circumstances under which it was taken and enjoyed are significant and helpful in estimating what the rights of the Crown were and how far, if at all, the Crown conferred rights over the land on the Company; but in itself and by itself occupation is not title.

The Crown does not claim to have annexed Matabeleland and Mashonaland. No Proclamation of annexation has ever been issued. Accordingly the Company contends that for want of it these regions have never belonged to the Crown, but that it has deliberately disinterested itself in regard to their ownership, and the conclusion suggested is that, if no one has now a better title than the Company, the inchoate title consisting of occupation is for present purposes property enough.

No doubt a Proclamation annexing a conquered territory is a well-understood mode in which a conquering Power announces its will urbi et orbi. It has all the advantages

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(and the disadvantages) of publicity and precision. But it is only declaratory of a state of fact. In itself it is no more indispensable than is a declaration of war at the commencement of hostilities. As between State and State special authority may attach to this formal manner of announcing the exercise of sovereign rights, but the present question does not arise between State and State. It is one between sovereign and subject. The Crown has not assented to any legislative act by which the declaration of its will has been restricted to one definite form or confined within particular limits of ceremonial or occasion. The Crown has not bound itself towards its subjects to determine its choice upon a conquest either out of hand or once and for all. If Her Majesty Queen Victoria was pleased to exercise her rights, when Lobengula was defeated by her and her subjects, as to one part of the dominions in 1894 and as to another part not until 1898, if she was pleased to do so by public acts of State which indicate the same election and confer the same supreme rights of disposition over his conquered realm as annexation would have done, it is not for one of her subjects to challenge her policy or to dispute her manner of giving effect to it. The fact being established that a conquest of Lobengula and his dominions had occurred, the question is what Her Majesty's Government thereupon elected and intended to do in Her Majesty's name. It cannot be said that not to annex forthwith was a renunciation of all right to annex at any time, or that a disposition of the public lands in the conquered territories as ample as if formal annexation had taken place is less operative than if that form had been employed. The true view seems to be that if when the protecting power of 1891 became the conquering power in 1893, and under the Orders in Council of 1894 and 1898 set up by its own authority its own appointee as adminstrator and sanctioned a land system of white settlement and of native reserves, it was intended that the Crown should assume and exercise the right to dispose of the whole of the land not then in private ownership, then it made itself owner of the land to all intents and purposes as completely as any sovereign can be the owner of lands which are publici juris, and that

the forms of an annexation to itself followed by a grant and conveyance to others for the purpose of grants over to settlers do not avail by their presence or their absence to affect the substance of these acts of State.

It is true that strong expressions as to the importance and the significance of annexation in connection with land ownership are to be found in the official despatches. Thus in 1885 Lord Derby writes that before annexation titles cannot issue in the name of the Queen, but of the chief to whom the land originally belonged, and in 1895 Lord Ripon, also speaking of Bechuanaland, states that it is a protectorate, and therefore Great Britain does not claim the land rights ; but both of these statements are made in reference to a territory in which the existing sovereignty of native chiefs continued and was respected, and neither dealt with regions in which the Crown had created the special administrative system established for Matabeleland and Mashonaland by the Orders in Council of 1894 and 1898.

It is therefore necessary to examine the circumstances and features of that system in order to determine, first of all, with what intention the Crown thus dealt with those countries, and, secondly, what is the true legal effect of those dealings as between the Crown and the Company. In 1894 the field was clear, for the native sovereignty was gone. There was relatively little in the nature of private ownership to incumber it. The Company's mineral rights under the Rudd concession, which were private rights and have been continuously recognized by the Crown as valid, affected the surface in a very minor degree, and the white settlers who held land by grant or occupation prior to 1894, and were recognized as private owners fully entitled, affected the question even less. Beyond the Lippert concession, such as it was, the Company had acquired no general rights, administratively or otherwise, that presented any difficulty or are now material. Its powers had been created ; its capital had been subscribed, and it was willing to raise more ; its operations had begun, and its staff was on the ground. The hands of Her Majesty's Government also were free. The existing protectorate of 1891 did not

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preclude another form of administration, either concurrently with or in substitution for it. The exercise of the powers given by the Foreign Jurisdiction Act did not operate as a negation of the exercise of other powers in the present, still less as a renunciation of the right to resort to them in the future. No interference was immediately to be apprehended from outside, for the Banyai trek of 1891 had been stopped, and there was no threat of a repetition of it, and, whatever Her Majesty's foreign policy and relations might require or be, the position in South Africa was for the time being not one of embarrassment. White settlement and the consolidation of British influence were objects common to both Crown and Company. Both desired to encourage white settlers generally to select and acquire land, and, on compliance with the prescribed formalities, they were to become absolute owners of their holdings. Plainly, if white settlement was to take place, the administration must go to considerable expense in developing the country, of which communications of all kinds were among the most pressing needs, while returns could not be looked for till some later period, possibly remote. It was also plain that the necessary effect of that expenditure, if judiciously made (as the growth of population and prosperity in Southern Rhodesia shows in the main that it was), must be to appreciate the unalienated lands, so that when sales had reimbursed outlays the unsold residue would enrich its owners whoever they might be. In these conditions and with these facts before it the Crown elected not to incur the cost and responsibility of direct administration, but to intrust it to the Company, a commercial concern, which happened to be already administering part of the region, and the Company accepted the employment and undertook the burden of financing the administration.

One thing is most notable. Nowhere is there any express grant of the unalienated lands by the Crown to the Company. The hypothesis that the Crown settled the lands, by conveying to the Company in trust to sell them and apply the proceeds to the necessities of administration, need not be considered. Not only is there no declaration of any such trust, no beneficiary named and no trust indicated, but there is no con-

veyance at all. The Crown never, and the Company always, executed the grants to the settlers. The deeds are under the Company's seal, attested, be it observed, by the Administrator, and not by the directors or secretary. Nor was any instrument given to the Company, such as would correspond to the commission which it is the practice to confer on a Colonial governor or administrator or to a power of attorney, authorizing the Company to sell and convey lands on behalf of the Crown. Again these are matters of form. No law restricts the power of the Crown to confer the authority necessary for the above-mentioned purposes to one particular type of instrument. The Ordinances and regulations under which this system of making grants to settlers was carried on had full legal effect. They are legislative acts under which, if the natives had enjoyed rights in the nature of private property, those rights would have been expropriated with sufficient clearness, and under which, as it was, the Company became empowered to grant in particular cases and in detail that of which the Crown was in this way disposing generally. In effect this code authorized the Company to dispose of lands owned by the Crown and to give title on its behalf. If one thing is more completely agreed in this matter than another it is that the grantees obtain an indisputable title, and, as the Company is not shown to have any ownership of its own, then, to make the title indisputable, it must have been given by the Company on behalf of the Crown, which had so acted as to warrant the conclusion that it had taken to itself the ownership and the right of disposal. It is not that there was an intermediate grant by the Crown to the Company followed by the Company's grant to the alienees. The implication of a universal grant of the unalienated lands by the Crown to the Company without a word said or a paper signed is an impossible conclusion. The Company contends that the way in which it has in fact disposed of the unalienated lands and their profits and proceeds indicates some sufficient form of ownership of the land and of title to the moneys. The elected members say the said moneys are applicable only to defray the current costs of administration and do not belong to the Company as a

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commercial concern. Presumably, if and when these revenues by themselves suffice to meet the expenditure of the current year, it is meant that the Company would under all circumstances be bound so to apply them and could not by otherwise disposing of them justify resort to its powers of taxation generally. It may be said at once that the use of the word "ownership" in this connection is a misuse of terms. The uncontested disposal of lands, as upon a grant for value, may be indicative of ownership in the grantor or it may not; if, as is here the case, it is otherwise explained and is indicative of a particular authority from the Crown in that behalf as owner, no further or other inference arises from the practice of disposing of the lands direct. As to the revenue thence accruing, other considerations arise.

If a landowner, desiring to develop his estates for sale, loath or unable to meet immediate outlay or to take personal trouble, employs a commercial agent, natural or incorporate, to do this for him, obviously he would, if matters stopped there, come under definite legal obligations to his employee. English law in such a connection speaks of an implied contract: not that it supposes that the parties actually made a parol agreement but forgot to record it, or had identical intentions in mind but omitted to express them; but this is the accepted terminology under which legal effect is given to such relations. In the present case, however, their Lordships do not propose to deal with the question referred to them under any terms of art peculiar to municipal law. They desire to take a broader view.

Alike by the common and by the civil law, certain legal incidents attach de jure to the relationship which is constituted by the grant of an authority on the one hand, to be exercised for the benefit of the grantor, and the exercise of that authority by the recipient of it on the other according to his mandate. It is not that this arises out of some unexpressed stipulation; it is annexed to the relationship. True it is that by stipulation these incidents can be rebutted and negatived, and the stipulation may be express or implied; it may be established by words and writing or by circumstances and conduct. One of these incidents is this. If in the exercise of the authority con-

ferred the party authorized is obliged to expend his own moneys in the discharge of the authority conferred upon him, it is incident to the relationship that he is entitled to look to his principal and employer for reimbursement. This may be so either absolutely or sub modo ; it depends on the circumstances of the case. He may be entitled to claim repayment directly in money, or only to reimburse himself in a particular way or to have the opportunity of reimbursement secured to him from a particular source. This again depends on an inference from the whole circumstances of the case, to be collected, just as stipulations excluding such reimbursement altogether might be collected, by considering the intention of the parties. The material point is that the right to reimbursement presumptively exists. If it is to be negatived, this has to be shown affirmatively by inference from what is said or done.

Since it was certainly necessary for the Company in the exercise of its authority as administrator of Southern Rhodesia under the Crown to expend its own moneys for the purposes of the administration—a thing clearly obvious from the first—the question is, what, if anything, limits or excludes the right to reimbursement therefrom arising ? Has it been excluded by an express agreement ? In 1894, before the issue of the Matabeleland Order in Council, what was called an agreement was entered into between the Company and the Crown, but it did not purport to reduce into writing the entirety of their relations. In form it was unilateral. It did not deal with the general question of rights of property. It made no provision for the grant of powers by the Crown, and left to implication or to separate arrangement the nature and extent of the authority under which the Company was to act. It is correctly described by its authors on the part of the Crown as an arranged scheme for the outlines and general form of the administration to be established. This, then, will not suffice to exclude the right to reimbursement by express agreement. Nor do the general circumstances rebut the presumption of such a right. It is true that there is in private affairs a presumption that if a commercial agent is employed he is entitled to a reasonable remuneration for

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his work, and yet no one suggests that the Company has any claim to remuneration. This, however, finds its own explanation in circumstances which do not affect the right to reimbursement. The Company had extensive mineral interests, which might under a good administration of the country become highly valuable. Obviously it desired to keep in its hands after the fall of Lobengula the administration, which it was already carrying on for its own benefit as well as for that of settlers, and it is not unreasonable to suppose that in a public matter like administration its directors were not minded to drive a hard bargain with the Crown. There is nothing, however, to show that to gratuitous administration, as far as the services of its own officers were concerned, the Company either would or could propose to add the gratuitous endowment of that administration at the expense of the shareholders.

It is, moreover, to be collected from the communications which passed between Mr. Rhodes and Lord Ripon, and still more clearly from the course pursued, that the Company was not intended to have any right to call directly upon the Crown while its administration continued. It was to sell land, to fix prices, to arrange terms of payment, to apply the revenue from the land and the proceeds of the sales, and if in process of time sales increased or prices went up year by year, then the advances to be made in the early years might be expected to diminish and eventually to cease, and the process of reducing the adverse balance on account of past development might begin and finally be carried to a successful issue. Once, in February, 1898, the Company proposed a definite arrangement, in the form of what they called a "principle," that "all future administrative expenditure not met by revenue, as also a fair proportion of past expenditure of the same nature, should . . . . be regarded as a first charge upon the country, and eventually be constituted a public debt." This was a proposal to saddle a young community, not yet advanced to self-government, with a charge, first, on the land alienated as well as unalienated, and then upon the personal liability of the taxpayers, a charge which

must be satisfied whether the sales of the lands and the administration revenue prospered or not, and it is not surprising that it met with no support from the Crown. The reply in July was that Mr. Secretary "must decline to pledge Her Majesty's Government in advance to acknowledging anything in the nature of a public debt or of a charge on the administration, as distinguished from the Company itself, which has been placed in possession of all the assets of the country." In a word, the Queen's Government refused to relieve itself of an Imperial liability by transferring it to a local population still imperfectly organized. It is possible that this refusal was not intended to be final, for Mr. Attorney, in his argument before their Lordships on behalf of the Crown, admitted that "these adverse balances, so far as legitimate, must, when the time comes, be converted into a public debt." Accordingly the matter remained one between the Company and the Crown, and the Company continued to be entitled to apply the proceeds of land sold in reduction of the proper cost of the administration, whether incurred in the current year or in the past.

Furthermore, the charter itself reserved to the Crown the right at the end of twenty-five years from its date, and thereafter at the end of every succeeding decade, to repeal so much of the charter as relates to administrative and public matters, and thereby to put an end to the Company's capacity to administer Southern Rhodesia, and this right is in addition to whatever right the Crown might have independently of this reservation to revoke its appointment of the Company as administrator and to repeal the Order in Council. The Company's right to reimbursement was therefore limited thus far, at any rate, that it had not any perpetual or immutable right to continue to conduct the realization of the unalienated lands for the purpose of accomplishing its own reimbursement. On the other hand, nothing confers on the Crown under the form or by the procedure of exercising this power the right to take away from the Company a right already accrued or a title already conferred upon it. Hence it follows that, in the event of the exercise of this power by the Crown, the

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Company must have the right to look to the Crown to secure to it, either out of the proceeds of further sales of the lands, by whomsoever made, or if the Crown should grant away these lands or proceeds to others, then from public funds, the due reimbursement of any outstanding balance of aggregated advances made by it for necessary and proper expenditure upon the public administration of Southern Rhodesia. With items or details, with the amounts or the book-keeping of such expenditure, and with the terms of reimbursement their Lordships have nothing to do.

It may be a matter of regret that, on a subject so important, it should have been thought fit to leave the rights of the parties to be ascertained by a legal inquiry whether, on a review of the whole circumstances and history of the transactions, there can be found any sufficient evidence of an intention to exclude a legal right which arises prima facie by operation of law from the relation in which the Crown placed the Company towards itself, but so it is. In matters of business reticences and reserves sooner or later come home to roost. In 1894 a single sentence, either in an Order in Council or in a simple agreement, would have resolved the questions which have for so many years given rise to conflicting opinions in Southern Rhodesia, and all the more easily because at that time the value of the whole of the country was unproved and problematical. Matabeleland and Mashonaland were rich in promise ; the right to enjoy the fruition might well have been determined before, and not after, the field was tilled and the harvest began to whiten. As it is, the conclusion is one of legal inference, but there is some satisfaction in reflecting that nothing has appeared upon the record to show that this conclusion differs substantially from that which would have commended itself to the negotiators on both sides if they had thought it opportune to deal with the question.

Their Lordships will humbly report to His Majesty that they affirm the first paragraph of the resolution passed on April 17, 1914 (1), and deny the third, and that as to the second they say that, so long as the British South Africa Company

(1) See pp. 229 and 230.

continues to administer Southern Rhodesia under the Crown, it is entitled to dispose of the unalienated lands in due course of administration, and to apply the moneys or revenues derived therefrom in duly reimbursing all proper outlays on administrative account in the current or in past years, and if its administration of Southern Rhodesia should be determined by the Crown, then the right to look to the Crown to secure to it (either out of the proceeds of further sales of the lands by whomsoever made, or, if the Crown should grant away these lands or proceeds to others, from public funds) the due reimbursement of any outstanding balance of aggregated advances made by it for necessary and proper expenditure upon the administration of Southern Rhodesia. This, however, and the other rights hereinbefore mentioned do not vest in it dominium or estate in or title to the said unalienated lands.

Solicitors for British South Africa Company: *Coward & Hawksley, Sons & Chance.*

Solicitor for Crown: *Treasury Solicitor.*

Solicitors for elected members: *Charles Russell & Co.*

Solicitors for natives: *Morgan, Price & Co.*

[PRIVY COUNCIL.]

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THE ANTILLA.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Practice—Right of Appeal—Order for Discovery—Refusal to Comply—Claim struck out—Condemnation by same Order—"Final Order"—Naval Prize Act. 1864 (27 & 28 *Vict. c.* 25), *s.* 5.

The Naval Prize Act, 1864, s. 5 provides: "An appeal shall lie to Her Majesty in Council from any order or decree of a Prize Court, as of right in case of a final decree, and in other cases with the leave of the Court making the decree or order."

Claimants to goods in prize proceedings having refused to comply with an order for discovery, the President ordered that their claim be struck out. Upon the same occasion the President, after considering the evidence, condemned the goods. An order or decree was drawn up embodying both the striking out of the claim and the condemnation of the goods:—

Held, that the claimants were not entitled under s. 5 of the Naval Prize Act, 1864, to appeal as of right.

PETITION to admit appeals from orders of the Prize Court, England.

In April and May, 1915, writs were issued by the Procurator General claiming the condemnation of cargo ex the *Antilla* and nine other Swedish vessels. The petitioners, Peder Melin & Co., entered appearances and claimed goods forming part of the cargo of each vessel. Orders for discovery in the form in *The Consul Corfitzon* (1) were made in each proceeding.

The petitioners having after long negotiations refused to comply with those orders the President (Sir Samuel Evans) on May 13, 1918, made in each proceeding an order whereby the petitioners' claim was struck out. The President on the same occasion, after considering the evidence, and acting under Order XV., r. 7 of the Prize Court Rules, condemned the goods. The striking out of the claim and the condemnation of the goods were embodied in one order.

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, LORD JUSTICE PICKFORD, and SIR ARTHUR CHANNELL.

(1) [1917] A. C. 550.

On July 10, 1918, the President refused an application by the petitioners for leave to appeal from the decrees or orders of May 13, 1918.

The petitioners by their present petition to the Judicial Committee prayed that appeals by them might be admitted and considered, and that the said orders might be reversed, altered, or varied.

Oct. 15. *Sir Erle Richards, K.C.*, and *Balloch* for the petitioners. The order of May 13, 1918, in each proceeding, was a "final decree" within the meaning of s. 5 of the Naval Prize Act, 1864; the petitioners consequently are entitled as of right to appeal. [Reference was also made to *The Baron Stjernblad.* (1)]

Sir Gordon Hewart, S.-G., R. A. Wright, K.C., and *R. Burrows* for the Crown. The order from which the petitioners seek to appeal is that striking out their claim; that was an interlocutory order. It is not material that at the same hearing the President, acting under Order XV., r. 7 of the Prize Court Rules, condemned the goods. It would be mischievous if an interlocutory order could be turned into a "final decree" for the purpose of appeal, merely by a failure to comply with its terms. [Reference was made to *Stewart* v. *Royds.* (2)]

Sir Erle Richards, K.C., replied.

The judgment of their Lordships was delivered by

LORD SUMNER. In this case the late President condemned certain cargo on board of a number of vessels, of which the *Antilla* is the first. The appellants, Peder Melin & Co., were claimants to a portion of the goods, and they now appeal, or desire to appeal, to His Majesty in Council against the condemnation and also against an order, which was made by the learned President on the same occasion, dismissing them from the proceedings as claimants upon the ground that they had not complied with an order previously made against them for discovery. The form

(1) [1918] A. C. 173. (2) (1904) 118 L. T. Jo. 176.

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in which the learned President's order was finally drawn up stated, first, that the claimants, the now appellants, had refused to obey the order of the Court for discovery of documents, and that thereupon the claim of the said claimants was struck out, and then it recited that the President had further considered the evidence, and having heard counsel for the Crown condemned the cargo in question.

The contention of the appellants is that under s. 5 of the Naval Prize Act of 1864 an appeal lies to His Majesty in Council from that order as of right, as being a final decree, but, inasmuch as the President upon a separate application declined to make any order with regard to security for appeal and otherwise, the appellants ask that their Lordships should supply that deficiency. It is plain that the question whether this appeal is competent or not, in any shape or form, and on any ground, depends upon the answer to a question, which arises in limine—namely, whether or not there is here a final decree against the appellants, from which they can claim under s. 5 to appeal as of right, because the President who made the order or decree, whichever it be, refused to grant any leave to appeal.

Their Lordships accordingly have taken this preliminary question now in order to save expense. There are two ways of looking at this question on behalf of the appellants. One is that the order that was made, and the proceedings which took place, ought to be regarded as one, so that, although the appellants' mouths were closed at the beginning, and they were dismissed from the proceedings because they did not give discovery, in substance their rights were finally determined at the end, and they were then entirely barred from any possibility of asserting their claim to the goods. It is said, if that be so, this may be regarded as a final decree, although in form it began by dismissing them, and then proceeded to dispose of the case technically in their absence. The other way of putting it is that the order, which in the more limited sense was made against them, that their claim be struck out, was itself a final decree within the meaning of s. 5, because it finally disposed of their

chance of being heard, and, therefore, of their chance of success.

Now, what the Board has to do is purely to construe a section in an Act of Parliament and to do so according to its language, neither liberally nor illiberally, but according to what it says, and the question of the rights of neutrals and public policy, which has been alluded to, really does not arise.

What, then, does the section mean ? To begin with there is a clear distinction drawn between decrees and particularly final decrees, and other cases ; that is to say, mere orders, or decrees which are not final, and unless this is a decree, and a final decree, then upon the construction of the section the appeal fails. Now, first, the finality is clearly something which is a property of the decree when made, and if it is not final when made, there is nothing in the section which enables it to be made final for the purposes of the statute by the subsequent conduct of the party in disobeying it. Secondly, it is something which, being a final decree, determines the issue in the cause and adjudicates upon the rights of the claimants to the goods, which are the subject of the cause.

To interpret this section in such a way that the claimants could turn that which was in itself a mere order of procedure into a final decree by disregarding it would be construing it so as to defeat the section and not to enforce it. As to the other point, it may be admitted that the matter is one very susceptible of argument, but their Lordships think that the true view of what passed is that there were two steps taken by the Court. This does not depend on the fact that the two steps were taken at a short interval or at a long interval of time, but on the nature of the steps taken. There was, first of all, the step taken by the Court of punitively striking out the claim, so that the claimants could no longer be heard, and then the subsequent step of considering the cause and adjudicating it upon the merits; and although it be the case that the effect of the adjudication, which was ultimately arrived at, was to bar the further chance of the claimants obtaining the goods, apart from the bar imposed by the fact that the appellants were silenced by being struck out of the case, their Lordships think upon the

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true view that they cannot be heard to question on appeal a final decree for condemnation, which, however it may affect their interests, was made after they had been validly dismissed from the proceedings and were no longer before the Court.

The result, therefore, is that their Lordships will humbly advise His Majesty that upon the preliminary point the appellants fail, and that any appeal would be incompetent. The petition will be dismissed with costs.

Solicitors for petitioners : *Kearsey, Hawes & Wilkinson.*
Solicitor for Crown : *Treasury Solicitor.*

[PRIVY COUNCIL.]

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DOMINION TRUST COMPANY . . . APPELLANTS ;

AND

NEW YORK LIFE INSURANCE CO. . RESPONDENTS.

[AND CONNECTED APPEALS.]

AN APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

British Columbia—Consolidation of Actions—British Columbia Supreme Court Rules, Order XLIX., *r.* 1—*Questions of Fact—Inferences—Weight to be attached to finding.*

Under Order XLIX., r. 1 of the rules of the Supreme Court of British Columbia the Court or a judge has an absolute discretion to consolidate causes, matters, or appeals.

The appellants, as executors, brought actions against three insurance companies upon life policies effected by the deceased. The main defence in each action was that the deceased had committed suicide (which was an excepted risk), but there were also defences based upon alleged misrepresentations which varied in the three actions. The trial judge consolidated the actions, and tried them together:—

Held, that the consolidation order, though ill-judged, was not ultra vires.

In considering the weight to be attached by an appellate Court to a finding of fact, a distinction should be drawn between cases in which the issue depends upon the veracity of the witnesses, and those in which it depends upon the proper inferences to be drawn from truthful evidence. In the latter class of cases the original tribunal is in no better position than the judges of the appellate Court.

Observations in *Montgomerie & Co.* v. *Wallace-James* [1904] A. C. 73 approved and applied.

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* *Present :* LORD FINLAY L.C., LORD BUCKMASTER, LORD DUNEDIN, and LORD ATKINSON.

APPEAL, and cross-appeal by special leave, from a judgment of the Court of Appeal of British Columbia, November 7, 1916, setting aside a judgment of the Supreme Court.

The facts and the effect of the judgments in British Columbia are stated in the judgment of their Lordships.

1918. July 11, 12, 15. *P. O. Lawrence, K.C., Martin, K.C.,* and *J. F. Carr* for the appellants.

E. P. Davis, K.C., Sir C. Tupper, K.C., and *Hon. M. Macnaghten* for the respondents.

Oct. 17. The judgment of their Lordships was delivered by

LORD DUNEDIN. These actions were raised in the Supreme Court of British Columbia by the Dominion Trust Co. in liquidation and its liquidator, as executors of the deceased W. R. Arnold against three insurance companies with whom Arnold had effectuated policies on his life. The first action against the New York Life Insurance Co. was in respect of two policies, one term and one life, for 50,000 dollars each, the policies having been taken out in September, 1916, just about a fortnight before the death occurred. The second action was against the Mutual Life Assurance Co. of Canada, in respect of a life policy for 50,000 dollars of date November 27, 1912, and the third against the Sovereign Life Assurance Co. of Canada, in respect of a policy for 10,000 dollars dated October 23, 1912.

Arnold died on October 12, 1914, from a gunshot wound through the heart in a garage belonging to him in the neighbourhood of Vancouver.

In each of the policies there was a clause exempting from liability if the death was self-inflicted within the period of two years from the date of the policy.

The main defence of each of the defendants was the same—namely, an allegation that Arnold's death was self-inflicted. There were other defences which were not common to the three actions. They were based on various alleged misrepresentations.

The learned Chief Justice before whom the actions depended consolidated the three actions in spite of the protests of the

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various defendants. Evidence was then led in the consolidated actions, and the learned judge came to the conclusion that none of the defences had been made out, and gave judgment for the amount sued for.

Appeal was taken to the Court of Appeal, and it was argued that the consolidation of the actions was not within the power of the Court; and further, that the conclusions arrived at on the facts were wrong.

In that court Macdonald C.J. and Galliher J. held that the consolidation order was within the power of the judge, but that the evidence proved that Arnold committed suicide. Martin J. and McPhillips J. held that the consolidation order was not within the power of the judge, and that consequently the trial was nugatory, and they expressed no opinion on the facts. In this state of opinion a formal judgment was pronounced allowing the appeal with costs, and setting aside the judgment of the Chief Justice, but not further dealing with the actions. Against this judgment an appeal was lodged to this Board, asking for restoration of the judgment of Hunter C.J. Leave was obtained on a petition by the respondents to raise on the appeal before this Board the contention that judgment ought to have been entered de plano for the respondents.

It appears to their Lordships that it is first of all necessary to settle the point as to the consolidation, for if the consolidation was ultra vires of the judge, then there is no proper material on which judgment can be given as to the defences on the facts.

On this point their Lordships agree with Macdonald C.J. and Galliher J. Consolidation is regulated by Order XLIX., r. 1, which is as follows: "Causes, matters, or appeals may be consolidated by order of the Court or judge in such manner as to the Court or judge may seem meet."

This rule differs essentially from the corresponding rule in the English courts (1), which provides that the power is to be exercised "in the manner in use before the commencement of the principal Act," thereby introducing a reference to the

(1) Order XLIX., r. 8.

course of previous decisions. The rule of the British Columbian Court is absolute, and seems to their Lordships to leave the matter, so far as ultra vires is concerned, entirely in the hands of the judge. Whether consolidation in such cases is expedient is quite another question. Where actions, although having a common feature, have distinctive defences, it would seem more than doubtful to take such a course. Nor does it alter the matter to say that in the event no prejudice was suffered. It might have been, and the decision had to be taken at the beginning. But though, perhaps, ill judged, it was not, in their Lordships' opinion, ultra vires. There was, therefore, proper material before the Court on which a judgment on the facts could be given. So far the appellants are right in their contention.

The learned trial judge gave a very careful and considered opinion, in which he set forth the chief considerations on the one side and on the other. The learned judges of the Court of Appeal who disagreed with him on the facts contented themselves with stating that they had come to an opposite conclusion from that reached by the trial judge. Accordingly the learned counsel for the appellants strongly pressed on their Lordships the consideration that a finding of pure fact arrived at by the judge who had tried the case and seen the witnesses ought not to be interfered with.

Their Lordships are of opinion that there must be discrimination as to what is the class of evidence being dealt with: whether the result arrived at depends on the view taken of conflicting testimony, or depends upon the inferences to be drawn from facts as to which there is no controversy. They may cite the words of Lord Halsbury in the case of *Montgomerie & Co.* v. *Wallace-James* (1): "Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to

(1) [1904] A. C. 73, 75.

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truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate Court." Lord Davey, in the same case, used much the same language.

Now, that this is a case of the latter class, there can be no doubt. It cannot be more strongly put than it was by the learned trial judge himself. He says: "I feel fortunate in coming to a conclusion that I have not to deal with any question of untruthful testimony . . . . in respect of any of the witnesses. . . . . I think that the only matter left for the Court to decide as to what is the proper inference to be drawn from the facts, the material portion of which, if not actually the entirety of these facts, not being in serious controversy. The only question is as to what is the true inference to be drawn."

Their Lordships, therefore, feel that they are here dealing with the opinions of one learned judge who thought that suicide had not been proved, and of two learned judges who thought that it had; and the question for them is, which of these two opinions is to be preferred?

The evidence to be examined in such a case falls at once into two distinct divisions. There is the evidence which bears on the motive for such an act, and there is the evidence of the facts as to the method of death, which include all actions of the deceased antecedent to, and possibly leading up to, the catastrophe.

Now, as regards the first of these branches, the position was this: Arnold was in a quite hopeless financial position. Enjoying a salary of 14,000 dollars a year, he owed at the time of his death about a million dollars, which he had not the faintest chance of repaying. But, further, it was not a case of simple indebtedness. He had been guilty of a long course of embezzlement in his position as managing director of the Dominion Trust Co. As he had confessed about a fortnight before to Hodges, the Government inspector, who had been sent to investigate the affairs of the company, "he had committed crimes for which he was liable to be sent to the

penitentiary." He was on the brink of exposure and disgrace as well as of irretrievable financial ruin. He had made an appointment on the day on which his death occurred to meet Hodges, in order to give explanations and exhibit securities. He knew that the result of that examination would be to confirm what Hodges already knew; and he knew that the presentation of Hodges' report to the Government authorities meant the end so far as he was concerned. The learned counsel for the appellants was very anxious to demonstrate that there was no particular disclosure which on that particular day he had to dread—that Hodges knew the worst already. That, however, is not the point. The point is that the end was approaching, and was ever nearer as Hodges' investigation proceeded and the time for sending in his report drew nigh. Further, he was in absolute want of ready money. He owed small sums right and left, and he had no more than a few dollars in his bank account. In the whole circumstances, if ever there can be said to be motive for self-destruction, such motive was present in this case.

Motive, however, can never be of itself sufficient. The utmost that it can do is to destroy or attenuate the inference drawn from the experience of mankind that self-destruction, being contrary to human instincts, is unlikely to have occurred. The proof of suicide must be sought in the circumstances of the death.

[The judgment then considered in detail the evidence as to the circumstances of Arnold's death, and continued as follows:]

On consideration of the whole circumstances of the case their Lordships are driven to the conclusion that death was self-inflicted by the deliberate intention of the deceased, and they agree with the result at which Macdonald C.J. and Galliher J. arrived. Nor is there, in their Lordships' view, any great cogency in the argument that various facts make it unlikely that he would choose of settled purpose that particular morning for the deed. If he had entertained the idea of putting an end to his troubles by suicide the particular moment might be uncertain to the last, and indeed

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suggested by some circumstance accidental in itself. But the determining element in the case is the real evidence afforded by the wound, its position, and its relation to the clothes worn, by the presence of the stick, which all point to the practical impossibility of the injury being caused by any accidental handling of the gun, however clumsy.

The case must go back with a declaration that judgment should be entered for the defendants and the action dismissed. The defendants must have their costs in the courts below and before this Board. The costs of the petitions of the respondents for leave to cross-appeal must, as was settled when leave was granted, be borne by the petitioners. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Mead, Steel & Co.*
Solicitors for respondents : *Charles Russell & Co.*

[PRIVY COUNCIL.]

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ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Conditional Contraband—Neutral Port—Enemy Destination—Order in Council of October 29, 1914, cl. 1 (iii.)—Order in Council of March 11, 1915, cl. 3.

Conditional contraband, namely, coffee, was shipped from Brazil in July, 1915, in a Swedish ship under bills of lading by which it was to be delivered to the appellants at a port in Sweden, where they carried on business. The coffee was seized at Kirkwall on August 24, 1915. At that date the property in the coffee had passed to the appellants, who were purchasers, and had the real control over it. The appellants intended to dispose of it to the German Government. The Prize Court condemned the coffee :—

Held, that the coffee was protected from condemnation by the Declaration of London Order in Council, No. 2, of October 29, 1914 (1), and that that protection was not removed by cl. 3 of the Order in Council of March 11, 1915. (2)

But *held*, that under cl. 3 above referred to, the appellants were entitled to restoration only upon such terms as the Prize Court might, in the circumstances, deem to be just, and that the case should be remitted to the Prize Court to determine such terms.

With reference to the Swedish Trade Law of April, 1916, which it

* *Present :* Lord Sumner, Lord Parmoor, Lord Wrenbury, Sir William Pickford, and Sir Arthur Channell.

(1) The Declaration of London, 1909, which was not ratified by Great Britain, by art. 35 purported to abrogate the doctrine of continuous voyage in the case of conditional contraband. The Order in Council of October 29, 1914, by cl. 1 adopted that Declaration subject to modifications. Modification (iii.) provided : "Notwithstanding the provisions of art. 35 of the said Declaration conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to, or occupied by, the enemy."

(2) The Order in Council of March 11, 1915, by cl. 3 provided : "Every merchant vessel which sailed from her port of departure after March 1, 1915, on her way to a port other than a German port carrying goods with an enemy destination may be required to discharge such goods in a British or allied port. Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and unless they are contraband of war shall, if not requisitioned for the use of His Majesty, be restored, by order of the Court, upon such terms as the Court may, in the circumstances, deem to be just, to the person entitled thereto."

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was alleged precluded the appellants from making full discovery of their trading books, their Lordships observed that it was impossible for a Prize Court, an international tribunal, to allow its investigation of the truth of matters brought before it to be limited by the restrictions of the municipal law affecting one of the parties.

Captors will not be allowed to succeed upon appeal by raising on the facts a case which was not presented in the Prize Court.

APPEAL from a decree of the President of the Admiralty Division (in Prize). (1)

The appellants, Aktiebolaget Dahlen and Wahlstedt, were coffee merchants carrying on business at Sundsvall, in Sweden. In July, 1915, they entered into a contract with a Brazilian firm to purchase 750 bags of coffee, of which 250 bags were shipped in the Swedish steamship *Kronprinzessin Victoria* under two bills of lading, each dated July 21, 1915. By the terms of the bills of lading the coffee was to be delivered to "Aktiebolaget Dahlen and Wahlstedt, Sundsvall, or to his or their assignees, against payment of the freight." Coffee was conditional contraband.

The 250 bags of coffee were seized on board the steamship at Kirkwall on August 24, 1915. At that date the property in the coffee had passed to the appellants.

The Procurator-General, by a writ dated September 13, 1915, claimed condemnation of the 250 bags as good and lawful prize as contraband of war, or that directions should be given as to the disposal of the same as goods of enemy origin and/or having an enemy destination.

The President (Sir Samuel Evans), by a judgment delivered on September 25, 1917, found that the coffee was shipped to and received by the appellants to be forwarded through Sundsvall to Hamburg, and condemned it.

The facts of the case appear fully in the judgment of their Lordships.

July 25, 26, 1918. *Sir Erle Richards, K.C.*, and *Balloch* for the appellants. It was not proved that the goods were destined for the German Government or forces. All the proper and usual documents in connection with the purchase and shipment of the coffee were produced. There was no

(1) Unreported.

evidence of dealings between the appellants and Germany, nor of intercepted correspondence of a suspicious character. The evidence of the bona fide nature of the transaction outweighed the general evidence as to the export of contraband goods from Sweden to Germany, which in *The Baron Stjernblad* (1) was held to constitute a prima facie case of suspicion. The President decided against the appellants because they did not produce their trade books. They were willing to do so, but were prevented by the Swedish Trade Law, referred to in *The Consul Cerfitzon*. (2) There being no evidence impugning the appellants in this or in previous transactions, they were not bound to submit their books to a roving inquiry.

Further, under art. 35 of the Declaration of London, as adopted and modified by the Order in Council of October 29, 1914, the goods were immune from condemnation. The consignees in Sweden being named in the ship's papers, the case is not within any of the modifications in cl. 1 (iii.) of that order. The appellants were not merely agents who had no control over the goods, as in *The Louisiana*. (3) They were bona fide purchasers to whom the property passed before the seizure. When the real consignee is named, the effect of the Order is that the goods are immune, however the consignee intends to deal with them after delivery: *The Louisiana*. (4) The judgment of the Board in that appeal was delivered after the judgment now appealed from.

Sir Gordon Hewart, *S.-C.*, *Stuart Bevan*, and *Clement Davis* for the Crown. The observations in the judgment in *The Louisiana* (4), on which the appellants rely, were obiter. Further, they related to a claim by a shipper. Here the claimants were consignees who themselves intended to give the goods an enemy destination. But in any case the appellants were not the persons who had the real control over the goods. Upon the facts proved they were merely agents for persons interested in importation into Germany, as in *The Louisiana*. (3) Even if the goods would have been

(1) [1918] A. C. 173.
(2) [1917] A. C. 550.
(3) [1918] A. C. 461.
(4) Ibid. 471.

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protected by cl. 1 (iii.) of the Order in Council that protection was withdrawn by the Order in Council of March 11, 1915, in that cl. 3 of that order is expressly confined to goods "not being contraband."

Sir Erle Richards K.C. replied.

Nov. 13. The judgment of their Lordships was delivered by

LORD SUMNER. In this case the late Sir Samuel Evans condemned 250 bags of coffee, conditional contraband of war, shipped by Nordskog & Co. on the Swedish steamship *Kronprinzessin Victoria* at Rio de Janeiro for delivery at Sundsvall, in Sweden, to the appellants, who were claimants below, an incorporated Swedish company trading as wholesale grocers under the name of Aktiebolaget Dahlen and Wahlstedt. The appellants swore that this coffee was part of a large quantity which they had previously bought of Nordskog & Co.; that they had declared before shipment that none of it was imported from, or would be sent to, an ulterior enemy destination, and that this declaration was true. The purchase contract and documentary evidence of payment for the coffee were forthcoming, and their genuineness was not denied. The Crown put in evidence of a statistical character of the changes, both in the general imports of coffee into Sweden and in the exports of coffee from Sweden, since the beginning of the war. This showed changes both in quantity and in destination, and also an increase in the appellants' imports in particular. There was also evidence, the sufficiency of which was admitted, that if the ulterior destination of this coffee was Germany, it would be imported into Germany for the use of the German Government and forces. No evidence was put in to contradict that of the Crown.

The appellants, whose declaration before shipment had stated that the coffee was intended for internal consumption in Sweden, made it part of their case at the trial that they were considerable exporters of coffee to Finland, as well as dealers in coffee in the Swedish province of Norrland, and in support of

this vouched two certificates by M. Censta Ohrn, and M. Ernst Yssarsson, signing respectively as "British Pro-Consul" and as "Acting British Pro-Consul" at Sundsvall, purporting to give the result of an examination of the appellants' sale notes and books. The learned President, justly impressed with the unquestioned fact among others that the appellants had multiplied their imports of coffee at least six times over since the war began, that the town in which they traded, with only 17,000 inhabitants, contained a score of other coffee importers, five of whom alone imported over 70,000 bags, while the appellants were importing 30,000, and that the two provinces of Jemtland and Vesternorrland, whose "commercial centre" is Sundsvall, only contain 375,000 inhabitants in all, thought that the nature of the appellants' export trade required further evidence. The bags are 60 kilog. bags, and an import of a quantity into Sundsvall sufficient to supply every man, woman, and child within its internal trading area with a third of a hundredweight of coffee for the year suggested a large export trade, nor was the proximity of Sundsvall to Finland inconsistent with that town's partaking in the extensive and lucrative trade with Germany which undoubtedly went on. Accordingly he offered to adjourn the hearing, in order that the claimants might have the opportunity of sending over, for examination in court, the books relating to their export trade, some entries in which had been submitted to the inspection of the British Vice-Consulate at Sundsvall. Their counsel accepted the adjournment, in order that his clients might consider what course they should take; but upon consideration they refused to avail themselves of the opportunity. Thereupon the learned President condemned the coffee, concluding his judgment with these words: "They have failed to satisfy me of the truth of their case. From the evidence adduced, and from all the circumstances of the case, including the conduct of the claimants, I draw the inference that the coffee seized was not bought by them for the purpose of consumption in Sweden or in order to become part of the common stock of that country or for the purpose of re-sale to any neutral country, but was shipped

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to and received by them to be forwarded through Sundsvall to Hamburg."

Three questions have been raised before their Lordships: (1.) Whether this was a finding that the appellants were not really the consignees of the coffee, but only figured as such fictitiously, in order to disguise the importation of the coffee into Germany by a Hamburg firm via Sundsvall; (2.) whether, if so, or if it was a finding that the appellants were the true consignees importing the coffee, but with an ulterior destination in Germany beyond Sundsvall, it was competent to the learned President so to find on the materials before him; and (3.) if the finding was to the latter effect, whether it was material or warranted the condemnation of the goods in view of the destination of the ship, the tenor of the ship's papers, and the language of the Declaration of London Order in Council No. 2, dated October 29, 1914.

Their Lordships are of opinion that the learned President did not find that the claimants were only colourable and sham consignees of this coffee. There are circumstances in the case suggesting such a conclusion, connected with the banking transactions by means of which payment was made for the coffee, and with the part played in it by Nordskog & Co., of Rio de Janeiro, and Santos in Brazil, and of 113 Readhusgatan, Christiania, by Carl B. Prösch, also of Christiania, and by Eugen Urban & Co., coffee importers, of Hamburg. There are also observations made during the hearing and passages in the judgment of the learned President which seem to refer to such a suggested conclusion, but their Lordships are satisfied that this was not the case presented by the Crown in the Prize Court, and they think that this was not the finding at which he arrived. Even if the materials would have warranted such a conclusion, as to which no opinion need be expressed, their Lordships would not be prepared to allow the captors to succeed on appeal by raising a case on the facts which they never presented for the determination of the Court below.

Their Lordships are of opinion that the materials before him warranted the learned President in finding the ulterior

German destination, which they conceive to be the true effect of his judgment. The admissibility of what is called a statistical case has already been recognized. Not only was this case pointed to the general contrast between the overseas trade of Swedish merchants before and after the outbreak of war, but particular and precise evidence was given of the remarkable expansion of the appellants' own operations; and this was reinforced by evidence of their credit and associations. Their Lordships do not say that less might not have sufficed; the question is one of the evidence actually given. There is further the fact that the appellants declined to produce their books in court. Here again, be it observed, the President did not order them to embark on an inquiry which they had not opened or order that proof of a particular branch of the case should be given in one way only. The appellants had vouched in their own favour on one aspect of the case their own record of certain selected transactions; they had the opportunity of completing that aspect of the case from materials of the same class in their own possession by way of rebuttal of the captors' evidence, and to make that opportunity fruitful were informed how best, in view of the President's great experience of these cases, they could present such evidence so as to bring conviction to his mind. It is nothing to the point to urge that they had engaged in a trade which to them was lawful though pursued at their peril, or to say, as they did say, that their trading books were required in Sweden, and that Swedish law placed a limit on the extent to which they could give "discovery throwing light upon our case." They claimed the coffee in the Prize Court here, and if the evidence by which their case might have been cogently supported was required for their other business in Sweden, it was for them to choose whether they would conduct their case or their business to the better advantage. Their Lordships fully appreciate the learned President's view, that an offer of inspection of the books in Sweden "by a notary public or otherwise" was in the circumstances almost illusory. As to the reference to the law of Sweden, the matter has been dealt with in other cases. Though loath to credit that Swedish law,

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truly understood, does restrict the right of a Swedish subject to support a case which he is concerned to prove by the best evidence of his own transactions, and while recognising that, if it be so, this is not a matter for their criticism or animadversion, but solely one for the judgment of the Government and Legislature of the Kingdom of Sweden, their Lordships must observe, as they have observed before (1), that it is impossible for a Court of Prize, an international tribunal, to allow its investigation of the truth of the matters brought before it to be limited by the restrictions of the municipal law affecting one of the parties to the proceedings before it. Their Lordships cannot hold that a captor's evidence is not to prove whatever it is capable of proving merely because the claimant is not permitted by the laws of his country to produce the evidence appropriate to rebut it.

The remaining question turns upon the construction of cl. 1 (iii.) of the Declaration of London Order in Council, No. 2. This Order, which declares, inter alia, under what modifications His Majesty will recognize art. 35 of the Declaration of London, so long as the Order is in force, operates, as has been already decided, as a waiver of the belligerent rights of the Crown in favour of neutrals, to which a Court of Prize will give effect as against captors. His Majesty, who was pleased to announce such a waiver, is entitled to modify or to recall it, as he may be advised; and, in fact, the Order in Council of July 7, 1916, did in terms revoke the Order in Council of October 29, 1914, and proceeded to deal with the same matters otherwise. It was, however, argued by the Solicitor-General that there had been a prior restriction or revocation of that waiver—namely, by the Order in Council of March 11, 1915—and the date of the shipment of the coffee and voyage of the *Kronprinzessin Victoria* was, in fact, such that the latter Order would cover that period, though the Order of July 7, 1916, would not. The argument shortly was that, the object of the Order in Council of March 11, 1915, being in the words of the recital "to prevent commodities of any kind from reaching or leaving

(1) See *The Consul Corfitzon* [1917] A. C. 550, 555.

Germany," and the substantive provision of cl. 3 being that goods with an enemy destination carried in a ship bound for a port other than a German port shall be discharged in a British or allied port, and subsequently be restored on terms, "unless they are contraband of war," it would be unreasonable to hold that, if they are contraband of war, they may be released unconditionally, for that would expressly defeat the object of the Order in Council itself. Hence it was said that to avoid so unsatisfactory a result the Order in Council of 1915 must be deemed to have revoked by implication the concessions made under the Order in Council of October 29, 1914. The point is novel. It might have been taken, but was not, in *The Louisiana*. (1) The contrary was assumed to be the case, though it is true there had been no argument, by their Lordships' Board in *The Proton*. (2) It was not taken by the Crown before the learned President in the present case, nor is a contention plausible which involves the proposition that an Order directing goods to be restored, "unless they are contraband," is an Order condemning them if they are, all other Orders in Council notwithstanding. The words "unless they are contraband of war" naturally mean that the Order in question does not apply to such goods for which there are other legal provisions.

Their Lordships, however, hold, for two reasons of a somewhat more general character, that the Order in Council of October 29, 1914, was not in this particular affected by the Order in Council of March 11, 1915. The whole tenor of the Order of July 7, 1916, the recitals, the repeal, and the re-enactment, are consistent only with the view that the Order of October 29, 1914, had up to that date remained in full force and unaffected. Further, though no form of words and no formal instrument can be prescribed to the Crown, by which to revoke its former grant or to resume the full belligerent rights, which had previously been waived, it is at least necessary that the intention to revoke and the intimation of the resumption should be unambiguous and clear. It would ill become the dignity of the Crown, and be little

(1) [1918] A. C. 461. (2) [1918] A. C. 578, 580.

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congruous with its responsibility, alike towards its subjects and to neutrals, in exercising or forbearing to exercise belligerent rights, if concessions publicly and advisedly made were to be recalled by words of doubtful import or by nice implications from language unquestionably employed alio intuitu. If this contention were to prevail it would follow that the decision of the board in *The Louisiana* (1) was a decision on the true construction of an Order which was inapplicable because it had been revoked. It is true that there is nothing in that decision which would preclude the board, by authority, from considering the contention, for the construction of an instrument and its applicability are different matters; but their Lordships cannot but feel confirmed in the opinion which they have formed by the fact that on the former occasion the law officers of the Crown either did not think of the point or deemed it better not to raise it.

The construction of the Declaration of London Order in Council, No. 2, cl. 1 (iii.), remains to be considered. Here, again, the judgment in *The Louisiana* (1) does not conclude the matter, for the language there used (2) dealt with the position of a neutral shipper anxious to know how far his shipment would be covered, when consigned to some actual named consignee in a country adjacent to Germany. It was there said that the neutral shipper would not suffer merely by reason of the intentions of that consignee. The claimants were the shippers. They claimed to be owners of the goods, and alleged that the consignees named in the bills of lading were so named for convenience only, and that no property passed to them. Here the claimants are the named consignees and, upon the case made in the Prize Court, they were consignees to whom the property had passed before seizure; in fact, the day before. Not only so, but they were consignees to whom the consignors had parted with the real control of the goods. Their intention, however, was to give the goods an ulterior enemy destination. Does this intention prevent them from being persons, the insertion of whose names in the bills of lading cause the ship's papers to "show who is the consignee

(1) [1918] A. C. 461. (2) [1918] A. C. 461, 471.

of the goods"? On principle, their Lordships think not. If the seizure had been two days earlier and the claims had been made by Nordskog & Co., the language employed in *The Louisiana* would have applied. The present is a different case; and whether the date of the passing of the property be, or be not, crucial, it cannot be said, on the present facts, that the appellants were not the consignees. It is not even shown that they had an arrangement with Nordskog & Co. or with some other parties under which they had engaged to forward the coffee to Germany, though what difference that would have made, being a personal obligation only, need not be decided. All that is shown is that they had an intention. This appears to be precisely the case, or one of the cases, in which, under the Order in Council in question, the ship's destination and the form of the ship's papers covered the goods. To extend the qualities which may be predicated of the consignee, whom the ship's papers are to show, to qualities connected with his general trade or with particular contracts, independent of the contract of carriage, would be to protect the goods only when the ship's papers show something, which in maritime practice they never do, and rarely could show. The coffee was accordingly in this case immune from condemnation, its ulterior enemy destination notwithstanding.

The Order in Council of March 11, 1915, cl. 3, provided for the discharge of the goods in the present case, and proceeded: "Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and unless they are contraband of war shall, if not requisitioned for the use of His Majesty, be restored, by order of the Court, upon such terms as the Court may, in the circumstances, deem to be just."

These words determine the mode in which these goods are to be dealt with after having been placed in the custody of the Marshal. It is for the President, in his discretion, to decide upon what terms they shall be restored. Presumably they have been requisitioned or sold, and are no longer in specie; if so, the proceeds of their money value will represent the goods and be the subject of his order. The decree of

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condemnation must be set aside and the case must be remitted to the Prize Court, to settle the terms of restoration (1); but as the point on which the appeal succeeds is one which was never properly urged upon Sir Samuel Evans, there can be no costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Travers-Smith, Braithwaite & Co.*
Solicitor for respondent: *Treasury Solicitor.*

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ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Cargo—Insurance against War Risks—Neutral Property at date of Seizure—Property of Enemy Underwriters at date of Claim.

Goods seized as prize in a British ship were, at the date of seizure, the property of a neutral firm. The goods were insured against war risks, nearly the whole of the insured amount being underwritten by Germans at Hamburg. After seizure, the German underwriters paid a total loss, and it was thereupon agreed that they should become owners of the goods. The neutral firm subsequently claimed in the prize proceedings, the claim being really on behalf of the German underwriters. The Prize Court dismissed the claim, and condemned the goods.

Held, that the claim was properly dismissed; but, without deciding that the condemnation was wrong and the Crown consenting, that the condemnation should be set aside, the proceeds of the goods remaining in the Prize Court until further order.

Decision of the Prize Court [1916] P. 230 varied by consent.

APPEAL from a decree of the President of the Admiralty Division (in Prize). (2)

The Associacion de Agricultores del Ecuador, a neutral firm carrying on business in Ecuador, appealed from a decree dismissing their claim to 4000 bags of cocoa seized in the British steamship *Palm Branch*, and condemning the goods.

The facts appear from the judgment of their Lordships.

* *Present:* LORD SUMNER, LORD WRENBURY, LORD STERNDALE, and SIR ARTHUR CHANNELL.

(1) The matter came before the Prize Court again on December 20, 1918, when the President (Lord Sterndale) ordered that the goods should be released to the appellants; no order was made as to costs.

(2) [1916] P. 230.

1918. Oct. 17, 18. *MacKinnon K.C.* and *C. R. Dunlop.* The appellants were the neutral owners of the goods at the date of seizure; they were therefore entitled to the goods or their proceeds. Ownership is the sole test, the Prize Court does not have regard to the owners' contractual obligations: *The Odessa* (1), *The Miramichi* (2), *The Ariel* (3). This case is the converse to *The Gothland.* (4) The suggestion in *The Parchim* (5) that the Prize Court is not concerned with questions of insurance was well founded. Much inconvenience would result from a contrary practice; it would be necessary to inquire into the nationality of each underwriter, not only of the insurance, but possibly of several re-insurances, and to investigate how far the risk was taken by the claimant himself. The effect of the correspondence was not that the appellants agreed that the German underwriters should become owners. The German underwriters had merely contractual rights against the appellants. They did not "take over the interest of the assured" within s. 63, sub-s. 1, of the Marine Insurance Act, 1906. The release could have been made upon terms which would have prevented payment to the German underwriters until after the war. In any case the goods, not being enemy property at the time of seizure, could not properly be condemned: *The Lützow.* (6) The writ expressly alleged that the goods belonged, at the time of seizure, to enemies of the Crown. The Crown has admittedly failed to prove that that was the case.

Their Lordships desired to hear counsel for the Crown only upon the question whether condemnation was properly decreed.

Hubert Hull (*Sir Gordon Hewart, S.-G.*, with him) for the Crown. In *The Prinz Adalbert* (7) goods which were the property of neutral claimants at the date of seizure, but which had become enemy property when the claim was made, were condemned. But even if strictly the proceeds should

(1) [1916] 1 A. C. 145.
(2) [1915] P. 71.
(3) (1857) 11 Moo. P. C. 119.
(4) [1916] P. 239, n.
(5) [1918] A. C. 157, 172, 173.
(6) [1918] A. C. 435, 440, 443.
(7) [1917] A. C. 586, 591.

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not have been condemned, there is no substance in the objection. Upon the claim being dismissed, the proceeds of the goods would remain in the Prize Court. They could be seized and fresh proceedings initiated: *The Schlesien.* (1) (Reference was also made to *The Remonstrant.* (2))

[After some discussion consent was given, on behalf of the Crown, to the decree for condemnation being set aside, the proceeds to abide further order.]

Dec. 13. The judgment of their Lordships was delivered by

SIR ARTHUR CHANNELL. This appeal raises some questions of prize law and practice which appear never to have been expressly decided.

The appellants are a neutral firm or company carrying on business in Ecuador, and they claimed 4000 bags of cocoa which were seized as prize or droits of the Admiralty, on board the British steamship *Palm Branch* in the Port of Liverpool on September 18, 1914, and were alleged on the writ to be enemy property. The appellants had shipped the cocoa at Guayaquil under bills of lading which made it deliverable to a German firm, Schlubach Thiemer & Co., of Hamburg; but it was proved to the satisfaction of the late President, and is not now disputed by the Crown, that the German firm were merely agents of the appellants for sale, and that no property passed to them, and the President expressly found that the goods at the date of their actual seizure at Liverpool were the property of the neutral claimants. The German agents had, however, insured the goods against war risks through a German insurance agent with underwriters, about 97½ per cent. of the risk being underwritten by Germans. After seizure, and before the claim of the appellants had been filed (which was not done until October, 1915), the German underwriters had paid as for a total loss. The cocoa had been sold under an order of the Prize Court, and in consequence of the rise in price caused by the war the proceeds of the sale largely exceeded the sum for which the cocoa had been

(1) [1916] P. 225. (2) (1917) 3 Br. & Col. P. C. 14.

insured. A desire to get this profit may have had something to do with the subsequent course of procedure. The underwriters who paid claimed from the assured the property in the goods, and considerable correspondence took place, which is set out in the record.

The learned President thought that this correspondence showed that the appellants had admitted the right of property to have passed to the underwriters who had paid, and that they had constituted themselves express trustees for those underwriters, and had made the claim as such trustees, and were being indemnified as to the costs. On this view of the facts the question certainly arose which the learned President considered it necessary to deal with; that is to say, what order should be made by the Prize Court when goods which were the property of a neutral when seized had become, before the neutrals' claim to them was made, the property of an enemy. He based his judgment on his answer to this question. It appears to be novel, and the late learned President dealt with it, in the way in which he has, in his too short career, dealt with other novel questions of prize law, by developing and applying to new facts the principles to be found in previously well-established law. He referred in detail to the ancient forms of affidavits, claims, and interrogatories directed to be used in the Prize Court as showing that the Court always required to be satisfied before ordering goods or their proceeds to be delivered up to claimants that no enemy had any interest in them. The allowance of a claim is obviously followed in ordinary cases by an order for delivery up of the subject-matter claimed. Their Lordships entirely agree with the late President as to what is the right rule in such a matter, and do not desire to add anything to the reasons given in his judgment on this point. The decision of this board in *The Prinz Adalbert* (1) as to the 290 barrels, part of the cargo there in dispute, is in accordance with this view of the rule. On the view of the facts taken by the learned President, and particularly in the view that the claim was in fact made by the appellants for, and on behalf of, enemies,

(1) [1917] A. C. 586.

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it became unnecessary to discuss any of the difficult questions which would commonly arise on claims made by underwriters, such as the question whether in the particular case a right of property had passed of a character which the Prize Court would recognize, or merely a contractual right which it would not recognize; see Marine Insurance Act, 1906, s. 63, *The Ariel* (1), *The Miramichi* (2), *The Odessa* (3), *The Parchim* (4), and the older cases referred to in those cases.

Their Lordships agree in the view of the facts taken by the learned President, except so far as it may be affected by his having overlooked the fact that a small percentage of the underwriters were not enemies, and that those underwriters had not paid. This, however, has no bearing on the disallowance of the appellants' claim, as it was clearly shown that the claim was in fact the claim of German enemies. This seems to their Lordships, as it did to the President, to be clear ground for disallowing the claim. The fact that a small portion of the underwriting was by neutral or British subjects had been mentioned in the argument below, but had not been seriously pressed, being, of course, somewhat inconsistent with, and at any rate not supporting, the then main argument of the appellants. He does not deal with it in his judgment, and it was not again mentioned to him when the judgment was delivered. If his attention had then been drawn to it he might have altered the form of the order he made, still, of course, disallowing the claim.

Their Lordships therefore think that the appellants' appeal against the disallowance of the claim fails, and should be dismissed with the usual consequences.

The President, having disallowed the claim, went on to condemn the goods, and this appears, on consideration, to give rise to some difficulty. It is said that the judgment in *The Prinz Adalbert* (5) (290 barrels), already referred to, supports the condemnation, as well as the disallowance of the claim. The particular point does not appear by the judgment in

(1) 11 Moo. P. C. 119.
(2) [1915] P. 71.
(3) [1916] 1 A. C. 145.
(4) [1918] A. C. 157.
(5) [1917] A. C. 586.

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that case to have been considered, and when the facts are looked at it will be seen that the difficulty which arises here did not arise there. The *Prinz Adalbert* was an enemy ship, and the cargo on board of her when she was captured would be presumed, if no claim to it was substantiated, to be enemy property. The *Palm Branch* is a British ship. So in *The Remonstrant* (1), which was also referred to, the judgment really was based on the fact that the claim made in the appeal was a different one from that made below.

The reasons of the President for condemning the goods are very shortly given. He merely said: "The claim is to the goods themselves. The hands of the captors have remained on the goods and their proceeds from the time when the underwriters obtained and claimed the ownership. No fresh act of seizure was necessary." This appears to mean that he treated the case as though the goods had been seized after they became enemy property and so condemned them. This seems to require rather careful consideration. Counsel for the Crown suggested that on its appearing that the goods, although not enemy property at the time of the seizure, had become enemy property whilst they were in the hands of the Court, a fresh writ could have been issued, and that condemnation would have followed as of course. For this *The Schlesien* (2) was quoted. Here, however, there was no fresh writ. It must be remembered that there is no general right to forfeit enemy goods, and that the right of a belligerent to capture enemy property and ask for its condemnation by a Prize Court as lawful prize is a maritime right, and is confined to property actually or constructively at sea. Their Lordships, having regard to the difficulty of the various points which arose, and doubting whether the material facts for the decision of all the points were fully before them, asked counsel for the Crown, before their argument was concluded, whether they would consent to have the condemnation set aside and the money directed to remain in Court until further order, and this consent was

(1) 3 Br. & Col. P. C. 14. (2) [1916] P. 225.

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given. That being so, their Lordships are of opinion that such an order should be made.

Their Lordships do not decide that the condemnation was wrong, as the argument in support of it was not concluded, and moreover it is far from clear that the appellants whose claim was rightly dismissed have any locus standi to question the condemnation—see *The Antilla* (1)—but it was, in their Lordships' opinion, right that the Crown should give the consent which it did, having regard to the doubts which had been raised. In any further proceedings as to the money in Court, it will be open to the Crown to make such application as they think fit either after issuing a fresh writ against the proceeds in Court or otherwise, in order to get payment of all or such part as they may be advised of the money in Court. It also will be open to any underwriters who are neutrals or British subjects, or any reinsurers who are not enemies (for it was suggested that some, at any rate, of the underwriters who had paid had reinsured) to put in such claim as they may be advised. Further, the dismissal of the appellants' claim, made as it was on behalf of the enemy underwriters, is not intended by the Board to prevent the appellants from putting in any claim they think they can establish, either on their own behalf or for any neutral beneficially interested, to that part of the money which in no case would have gone to the enemy underwriters. In any such further proceedings the facts will have to be brought before the Prize Court more fully than they have been before this Board, and it will be more convenient that they should be dealt with by that Court. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs, and that by consent of the Procurator-General on behalf of the Crown that part of the decree which condemns the proceeds of the goods as lawful prize should be set aside and that the money should remain in Court until further order of the Prize Court.

Solicitors for appellants: *Stokes & Stokes.*

Solicitor for Crown: *Treasury Solicitor.*

(1) Ante, p. 250.

[PRIVY COUNCIL.]

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ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Retaliatory Measures—Order in Council of March 11, 1915—Validity — Inconvenience to Neutrals — Neutral Ship — Damages for Detention.

When an Order in Council of a retaliatory character recites that the enemy has committed breaches of international law which justify retaliatory measures, the Order is conclusive that just cause for such measures exists. It is, however, open to a person aggrieved to contend, and the right of the Prize Court to hold, that the measures adopted are unlawful in that they entail on neutrals a degree of inconvenience which is unreasonable, considering all the facts of the case.

An Order in Council of March 11, 1915, recited that the German Government had issued certain Orders which gave His Majesty an unquestionable right of retaliation, and provided, inter alia, that every merchant ship on her way to a port other than a German port, carrying goods with an enemy destination, might be required to discharge the goods at a British port. The Order made no provision for compensation.

A neutral ship on her way to Rotterdam with goods destined for Germany was required to discharge at a British port; no unreasonable delay or expense in carrying out the provision of the Order was incurred.

Held, that the Order in Council did not entail unreasonable inconvenience on neutrals and was valid, and that the neutral shipowner was not entitled to damages for the detention of the ship or to expenses.

Decision of the Prize Court [1916] P. 123 affirmed.

APPEAL from a judgment of the President of the Admiralty Division (in Prize). (1)

The appellants, managers of the Norwegian steamship *Stigstad*, claimed in the Prize Court for freight, damages for detention of the ship, and expenses. The ship had been required to discharge her cargo at Middlesbrough, under the provision of an Order in Council of March 11, 1915. The facts appear from the judgment of their Lordships.

The President, Sir Samuel Evans, upon the claim of the Norwegian cargo-owners coming before the Court, had ordered

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, LORD STERNDALE, SIR ARTHUR CHANNELL.

(1) [1916] P. 123.

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that the appellants should receive out of the proceeds of the cargo a sum for freight to be agreed, or in default of agreement to be determined by the Registrar in accordance with the principles laid down in *The Juno*. (1) The President, by a judgment delivered on April 14, held that the Order in Council was valid, and that the appellants were not entitled to the further compensation which they claimed.

The material terms of the Order in Council appear from the report of the proceedings before the President.

1918. Oct. 15, 16. *R. A. Wright, K.C.*, and *Balloch* for the appellants. First, under the terms of the Order in Council, the appellants were entitled to receive, out of the proceeds of the cargo, compensation for delay and expenses, in addition to the freight awarded to them. Art. 5 (2.) provides that the practice and procedure of the Prize Court is to be followed in any proceedings consequential upon the Order. The authorities show that, according to the practice of the Prize Court, a neutral ship innocently carrying contraband is entitled to freight and expenses out of the proceeds of the seized cargo: Pratt's Story on Prize Courts, p. 92; *The Anna Catharina* (2), *The Bremen Flugge* (3), *The Hoop*. (4) The first of those cases shows that demurrage is included in the "expenses" to which the ship is entitled. Secondly, the Order in Council is invalid. A belligerent cannot, by measures in reprisal against an enemy, interfere with the commercial rights of neutrals in a manner which extends the recognized modes of interference, namely blockade and the prevention of unneutral services and contraband trade. The present Order in Council conflicts with the Declaration of London as to the carrying rights of neutral ships, also by attempting to create a blockade which is not a real blockade; further, it prevents neutral ships from proceeding to neutral ports, and thereby it infringes the well-established rule that a belligerent cannot blockade a neutral port. The

(1) [1916] P. 169.
(2) (1805) 6 C. Rob. 10.
(3) (1801) 4 C. Rob. 90.
(4) (1799) 1 C. Rob. 196, 219.

retaliatory Orders made during the Napoleonic wars (1) were considered by Lord Stowell in many cases: e.g., *The Courier* (2), *The Fox* (3), *The Snipe.* (4) Lord Stowell in those cases considered himself precluded from enquiring into the validity of an Order in Council. Since the judgment of the Board in *The Zamora* (5), therefore, those decisions cannot be regarded as authorities on the question whether a reprisals order is valid. Sir Robert Phillimore (International Law, Vol. III., par. 169) condemns the British retaliatory Orders of that period as being contrary to the law of nations; no writer on international law, save one (Manning's Law of Nations, ch. 10), justifies them, and his reasons are unsatisfactory. The validity of an Order in Council of the character of the Order of March 11, 1915, was not specifically considered in *The Zamora.* (5) If, however, the test there laid down is applicable, then the Order was invalid, in that it entailed on neutrals inconveniences which were unreasonable in the circumstances. If the restrictions themselves were not unreasonable, the Order is unreasonable and invalid so far as no compensation is provided.

Sir Frederick Smith, A.-G., Sir Gordon Hewart, S.-G., MacKinnon, K.C., and *Hubert Hull* for the Crown. In order to nullify, so far as possible, acts of an enemy contrary to the laws of nations, a belligerent is entitled to take measures which interfere with neutrals in a manner which otherwise would not be justified. A contrary view would render a belligerent impotent against acts contrary to the usages of war. The test of the legality of a retaliatory Order is that laid down in *The Zamora* (5), namely, does it entail on neutrals inconveniences which are unreasonable considering the circumstances in which it is made? The

(1) Reference was made to: Napoleon's Berlin Decree, November 21, 1806, and Milan Decree, December 17, 1807; and to the British Orders in Council of January 7, 1807, November 11, 1807, April 26, 1809, June 23, 1812. The more important of the above decrees and Orders will be found in the appendix to Edwards' Reports.

(2) (1810) Edw. 249.

(3) (1811) Edw. 311.

(4) (1812) Edw. 381.

(5) [1916] 2 A. C.

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circumstances here were that the German Government, by Orders which it was putting into force, intended to prevent the importation into Great Britain of every kind of product, the Orders involving the constraint and destruction of both British and neutral shipping. The object of the Order of March 11, 1915, was to prevent neutral shipping being withdrawn from the service of the Allies and placed at the service of the enemy. The effect of the Order was not in excess of what was necessary to prevent that result. The circumstances are considered in the judgment of the late President in *The Leonora* (1) in dealing with the later Order in Council of February 16, 1917, which he held to be valid. The Order now under consideration is of a less drastic character, and the reasoning of that judgment applies a fortiori. The old retaliatory Orders were never challenged, except on the ground that the French Orders were merely executory and had not been carried out. Assuming that the Order is valid, the appellants are not entitled to damages, since there is no provision for compensation. There is no authority for an award of demurrage to a neutral ship seized while innocently carrying contraband.

R. A. Wright, K.C., replied.

Dec. 16. The judgment of their Lordships was delivered by

LORD SUMNER. The appellants in this case were claimants below. They are a Norwegian company which manages the steamship *Stigstad* for her owners, the Klaveness Dampskibsaktieselskab, a Norwegian corporation. While on a voyage, begun on April 10, 1915, from Kirkenes, Sydvaranger, in Norway, to Rotterdam with iron-ore briquettes, the property of neutrals, she was stopped in lat. 56° 9′ N. and long. 6° 6′ E. about a day's sail from Rotterdam by H.M.S. *Inconstant*, and was ordered to Leith and thence to Middlesbrough to discharge. Their claim was for "(1.) freight, (2.) detention, and (3.) expenses consequent upon" this seizure and the discharge

(1) [1918] P. 182.

at Middlesbrough afterwards. The detention was measured by the number of days which elapsed between the expected date of completing discharge at Rotterdam and the actual date of completing discharge at Middlesbrough, calculated at the chartered rate for detention, viz., 130*l.* per day; and as to the expenses, while willing to treat port dues and expenses at Middlesbrough as the equivalent of those which would have been incurred at Rotterdam, the owners claimed some port dues and expenses at Leith and a few guineas for special agency expenses at Middlesbrough. Eventually the cargo was sold by consent, and a sum, the amount of which was agreed between the parties, was ordered to be paid out of the proceeds to the claimants for freight; but the President, Sir Samuel Evans, dismissed the claims for detention and for the special expenses. It is against his decree that the claimants have now appealed. They have admitted throughout that, in fact, the cargo of iron-ore briquettes was to be discharged into Rhine barges at Rotterdam in order to be conveyed into Germany.

The cargo was shipped by the Aktieselskabet Sydvaranger of Kirkenes, and was to be delivered to V. V. W. Van Drich, Stoomboot en Transport Ondernemingen, both neutrals, but it is contended that s. 3 of the Order in Council, dated March 11, 1915, warranted interference with the ship and her cargo by His Majesty's Navy on the voyage to Rotterdam. The President's directions as to freight were that "the fair freight must be paid to them, having regard to the work which they did," the principle which he had laid down in *The Juno* (1) being, in his opinion, applicable. The claim for detention is, in truth, a claim for damages for interfering with the completion of the chartered voyage, for it is admitted that delivery was taken at Middlesbrough with reasonable dispatch. That part of the claim which relates to the ship's being ordered to call at Leith and the claim for expenses incurred there are claims for damages for putting in force the above-named Order in Council, for it is not suggested that the order to call at Leith, and thence to proceed to

(1) [1916] P. 169.

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Middlesbrough, was in itself an unreasonable way of exercising the powers given by the Order. The small claim for fees at Middlesbrough seems to relate to an outlay incident to the earning of the freight which has been paid, and was covered by it; but, if it is anything else, it also is a claim for damages of the same kind. "Damages" is the word used by the President in his judgment; and, although it was avoided and deprecated in argument before their Lordships, there can be no doubt that it, and no other, is the right word to describe the nature of the claims under appeal.

It is impossible to find in the express words of the Order any language which directs that such damages should be allowed, nor are the principles applicable which have been followed in *The Anna Catharina* (1) and elsewhere, as to allowance of freight and expenses to neutral ships, whatever be the exact scope and application of those cases. Again, with the fullest recognition of the rights of neutral ships, it is impossible to say that owners of such ships can claim damages from a belligerent for putting into force such an Order in Council as that of March 11, 1915, if the Order be valid. The neutral exercising his trading rights on the high seas and the belligerent exercising on the high seas rights given him by Order in Council or equivalent procedure, are each in the enjoyment and exercise of equal rights; and, without an express provision in the Order to that effect, the belligerent does not exercise his rights subject to any overriding right in the neutral. The claimants' real contention is, and is only, that the Order in Council is contrary to international law, and is invalid.

Upon this subject two passages in *The Zamora* (2) are in point. The first is at p. 95, and relates to Sir William Scott's decision in *The Fox*. (3) "The decision proceeded upon the principle that, where there is just cause for retaliation, neutrals may by the law of nations be required to submit to inconvenience from the act of a belligerent power greater in degree than would be justified had no just cause for

(1) 6 C. Rob. 10. (2) [1916] 2 A. C. 77, 95, 98.
(3) Edw. 311.

retaliation arisen, a principle which had been already laid down in *The Lucy*." (1)

Further, at p. 98, are the words "An order authorising reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case."

It is true that in *The Zamora* (2) the validity of a retaliatory Order in Council was not directly in question, but these passages were carefully considered and advisedly introduced as cogent illustrations of the principle, which was the matter then in hand. Without ascribing to them the binding force of a prior decision on the same point, their Lordships must attach to them the greatest weight and, before thinking it right to depart from them, or even necessary to criticize them at any great length, they would at least expect it to be shown either that there are authoritative decisions to the contrary, or that they conflict with general principles of prize law or with the rules of common right in international affairs.

What is here in question is not the right of the belligerent to retaliate upon his enemy the same measure as has been meted out to him, or the propriety of justifying in one belligerent some departure from the regular rules of war on the ground of necessity arising from prior departures on the part of the other, but it is the claim of neutrals to be saved harmless under such circumstances from inconvenience or damage thereout arising. If the statement above quoted from *The Zamora* be correct, the recitals in the Order in Council sufficiently establish the existence of such breaches of law on the part of the German Government as justify retaliatory measures on the part of His Majesty, and, if so, the only question open to the neutral claimant for the purpose

(1) (1809) Edw. 122. (2) [1916] 2 A. C. 77.

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of invalidating the Order is whether or not it subjects neutrals to more inconvenience or prejudice than is reasonably necessary under the circumstances.

Their Lordships think that such a rule is sound, and indeed inevitable. From the nature of the case the party who knows best whether or not there has been misconduct calling such a principle into operation, is a party who is not before the Court, namely, the enemy himself. The neutral claimant can hardly have much information about it, and certainly cannot be expected to prove or disprove it. His Majesty's Government, also well aware of the facts, has already, by the fact as well as by the recitals of the Order in Council, solemnly declared the substance and effect of that knowledge, and an independent inquiry into the course of contemporary events, both naval and military, is one which a Court of Prize is but ill-qualified to undertake for itself. Still less would it be proper for such a Court to inquire into the reasons of policy, military or other, which have been the cause and are to be the justification for resorting to retaliation for that misconduct. Its function is, in protection of the rights of neutrals, to weigh on a proper occasion the measures of retaliation which have been adopted in fact, and to inquire whether they are in their nature or extent other than commensurate with the prior wrong done, and whether they inflict on neutrals, when they are looked at as a whole, inconvenience greater than is reasonable under all the circumstances. It follows that a Court of Prize, while bound to ascertain, from the terms of the Order itself, the origin and the occasion of the retaliatory measures for the purpose of weighing those measures with justice as they affect neutrals, nevertheless ought not to question, still less to dispute, that the warrant for passing the Order, which is set out in its recitals, has in truth arisen in the manner therein stated. Although the scope of this inquiry is thus limited in law, in fact their Lordships cannot be blind to what is notorious to all the world and is in the recollection of all men, the outrage namely committed by the enemy, upon law, humanity, and the rights, alike of belligerents and neutrals, which led to, and indeed compelled, the adoption of some such policy as

is embodied in this Order in Council. In considering whether more inconvenience is inflicted upon neutrals than the circumstances involve, the frequency and the enormity of the original wrongs are alike material, for the more gross and universal those wrongs are, the more are all nations concerned in their repression, and bound for their part to submit to such sacrifices as that repression involves. It is right to recall that, as neutral commerce suffered and was doomed to suffer gross prejudice from the illegal policy proclaimed and acted on by the German Government, so it profited by, and obtained relief from, retaliatory measures, if effective to restrain, to punish and to bring to an end such injurious conduct. Neutrals, whose principles or policy lead them to refrain from punitory or repressive action of their own, may well be called on to bear a passive part in the necessary suppression of courses which are fatal to the freedom of all who use the seas.

The argument principally urged at the bar ignored these considerations, and assumed an absolute right in neutral trade to proceed without interference or restriction, unless by the application of the rules heretofore established as to contraband traffic, unneutral service and blockade. The assumption was that a neutral, too pacific or too impotent to resent the aggressions and lawlessness of one belligerent, can require the other to refrain from his most effective, or his only, defence against it, by the assertion of an absolute inviolability for his own neutral trade, which would thereby become engaged in a passive complicity with the original offender. For this contention no authority at all was forthcoming. Reference was made to the Orders in Council of 1806 to 1812, which were framed by way of retaliation for the Berlin and Milan decrees. There has been much discussion of these celebrated instruments on one side or the other, though singularly little in decided cases or in treatises of repute; and, according to their nationality or their partisanship, writers have denounced the one policy or the other, or have asserted their own superiority by an impartial censure of both. The present Order, however, does not involve for its justification a defence

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of the very terms of those Orders in Council. It must be judged on its merits and, if the principle is advanced against it that such retaliation is wrong in kind, no foundation in authority has been found on which to rest it. Nor is the principle itself sound. The seas are the highway of all, and it is incidental to the very nature of maritime war that neutrals, in using that highway, may suffer inconvenience from the exercise of their concurrent rights by those who have to wage war upon it. Of this fundamental fact the right of blockade is only an example. It is true that contraband, blockade, and unneutral service are branches of international law which have their own history, their own illustrations, and their own development. Their growth has been unsystematic, and the assertion of right under these different heads has not been closely connected or simultaneous. Nevertheless, it would be illogical to regard them as being in themselves disconnected topics or as being the subject of rights and liabilities which have no common connexion. They may also be treated, as in fact they are, as illustrations of the broad rule that belligerency and neutrality are states so related to one another that the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the rights of nations, the right to security and independence. The categories of such cases are not closed. To deny to the belligerent under the head of retaliation any right to interfere with the trade of neutrals beyond that which, quite apart from circumstances which warrant retaliation, he enjoys already under the heads of contraband, blockade, and unneutral service, would be to take away with one hand what has formally been conceded with the other. As between belligerents acts of retaliation are either the return of blow for blow in the course of combat, or are questions of the laws of war not immediately falling under the cognizance of a Court of Prize. Little of this subject is left to Prize Law beyond its effect on neutrals and on the rights of belligerents against neutrals, and to say that retaliation is invalid as against neutrals, except

within the old limits of blockade, contraband, and unneutral service, is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect.

Apart from *The Zamora*, the decided cases on this subject, if not many, are at least not ambiguous. Of *The Leonora* (1), decided on the later Order in Council, their Lordships say nothing now, since they are informed that it is under appeal to their Lordships' Board, and they desire on the present occasion to say no more, which might affect the determination of that case, than is indispensable to the disposal of the present one.

Sir William Scott's decisions on the retaliatory Orders in Council were many, and many of them were affirmed on appeal. He repeatedly, and in reasoned terms, declared the nature of the right of retaliation and its entire consistency with the principles of international law. Since then discussion has turned on the measures by which effect was then given to that right, not on the foundation of the principle itself, and their Lordships regard it as being now too firmly established to be open to doubt.

Turning to the question which was little argued, if at all, though it is the real question in the case, whether the Order in Council of March 11, 1915, inflicts hardship excessive either in kind or in degree upon neutral commerce, their Lordships think that no such hardship was shown. It might well be said that neutral commerce under this Order is treated with all practicable tenderness, but it is enough to negative the contention that there is avoidable hardship. Of the later Order in Council they say nothing now. If the neutral shipowner is paid a proper price for the service rendered by his ship, and the neutral cargo-owner a proper price according to the value of his goods, substantial cause of complaint can only arise if considerations are put forward which go beyond the ordinary motives of commerce and partake of a political character, from a desire either to embarrass the one belligerent or to support the other. In

(1) [1918] P. 182.

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the present case the agreement of the parties as to the amount to be allowed for freight disposes of all question as to the claimants' rights to compensation for mere inconvenience caused by enforcing the Order in Council. Presumably that sum took into account the actual course and duration of the voyage and constituted a proper recompense alike for carrying and for discharging the cargo under the actual circumstances of that service. The further claims are in the nature of claims for damages for unlawful interference with the performance of the Rotterdam charterparty. They can be maintained only by supposing that a wrong was done to the claimants, because they were prevented from performing it, for in their nature these claims assume that the shipowners are to be put in the same position as if they had completed the voyage under that contract, and are not merely to be remunerated on proper terms for the performance of the voyage, which was in fact accomplished. In other words, they are a claim for damages, as for wrong done by the mere fact of putting in force the Order in Council. Such a claim cannot be sustained. Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants : *Botterell & Roche.*
Solicitor for Crown : *Treasury Solicitor.*

[PRIVY COUNCIL.]

HIS MAJESTY'S PROCURATOR IN EGYPT . . . . . } APPELLANT;

AND

DEUTSCHES KOHLEN DEPOT GESELLSCHAFT . . . . . } RESPONDENTS.

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[AND CROSS-APPEAL.]

ON APPEAL FROM THE PRIZE COURT (EGYPT).

Prize Court—Seizure—Constructive Seizure—Suez Canal Convention, art. IV.—Tugs and Lighters—Coaling Business—"Petite Navigation Locale"—Hague Convention, No. VI., arts. 1, 2; *No. XI., art.* 3

A German company carried on at Port Said the business of coaling steamers, and for that purpose owned lighters, tugs, and motor boats. The tugs were capable of open sea voyages, but were used exclusively in harbour; none of the other craft were capable of taking the open sea. Prior to April, 1916, the company had carried on the business under licence. In that month the General Officer Commanding revoked the licence, and appointed a liquidator of the business, who thereafter had possession of the craft so far as they were not in use by the naval and military authorities. In July, 1916, the Procurator, intending to take proceedings in Prize, informed the liquidator that he should apply for an order for substituted service on the liquidator. It was agreed between them that upon proceedings being taken the liquidator should continue to hold the craft at the disposal of the Crown and the Prize Court. The craft were all in the Suez Canal or its ports. A writ claiming condemnation was issued, and by order was served on the liquidator. No objection was raised at the trial or upon the respondents' case upon the appeal that there had not been a seizure:—

Held, (1.) that there had been a sufficient seizure to give the Prize Court jurisdiction; (2.) that the seizure was not a breach of art. IV. of the Suez Canal Convention, and that had it been so the seizure would not have been bad; (3.) that, whether or not the craft were "navires de commerce" within the meaning of Hague Convention No. VI., arts. 1 and 2, the circumstances under which they were at Port Said were not those contemplated by the articles, and the craft were, therefore, liable to condemnation and not merely detention; (4.) that the craft were not exempt from capture under Hague Convention No. XI., art. 3, as "bateaux exclusivement affectés à des services de petite navigation locale."

APPEAL and cross-appeal from a decree of the Prize Court (Egypt).

* *Present:* LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

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On August 3, 1916, the Procurator in Egypt issued a writ in H.B.M. Supreme Court for Egypt (sitting at Alexandria), Vice-Admiralty Jurisdiction (in Prize), claiming the condemnation as prize of four tugs, seventy-four wood and steel lighters, and seven motor boats, belonging to the Deutsches Kohlen Depot Gesellschaft, a corporation registered, and having its principal place of business, at Hamburg. By leave of the Court the writ was served, by way of substituted service, on Mr. Lloyd Jones, who on April 29, 1916, had been appointed by the General Officer Commanding H.M. Forces in Egypt as liquidator to wind up the business.

The facts appear from the judgment of their Lordships.

Judgment was delivered by Grain J. on September 30, 1916. He rejected the claim made by the liquidator on behalf of the German company that the craft were exempt from capture by the Hague Convention, No. XI., art. 3. (1) On the other hand, contrary to the contention of the Procurator, he held that the craft were entitled to the protection afforded to a "navire de commerce" by the Hague Convention, No. VI., arts. 1 and 2. (2) He accordingly decreed that they should be detained and not condemned.

1918, Jan. 24, 25, 27; Oct. 21, 22. (3) *Sir Gordon Hewart S.-G.* and *G. T. Simonds* for the Crown. The craft were not "navires de commerce" within arts. 1 and 2 of the Hague Convention No. VI.; they should, therefore,

(1) Hague Convention, No. XI., art. 3: "Les bateaux exclusivement affectés à la pêche côtiere ou à des services de petite navigation locale sont exempts de capture. . . . ."

(2) Hague Convention, No. VI., preamble: "Désireux de garantir la sécurité du commerce internationale contre les surprises de la guerre, et voulant, conformément à la pratique moderne, protéger, autant que possible, les opérations engagées de bonne foi et en cours d'exécution avant le début des hostilités. . . . ." The English version of arts. 1 and 2 appears at [1917] A. C. 375, the words "merchant ship" being the rendering of "navire de commerce."

(3) In the course of the hearing in January, their Lordships raised the question whether there had been a sufficient seizure, and adjourned the hearing in order that further evidence might be obtained from Egypt. Lord Parker of Waddington and Sir Samuel Evans, who were members of the Board in January, died before the further hearing.

have been condemned and not merely detained. "Navire de commerce," as used in the Convention, means a vessel which is capable of carrying cargo and is engaged in international commerce: Preamble to Convention No. VI.; *The Germania* (1); Littré's Dict., s.v. "navire." [Reference was also made to *The Vulcan Coal Co.* (2)] Even if the craft were "navires de commerce" art. 2 does not apply, because a period of grace was provided by the decree of the Egyptian Government dated August 5, 1914, but the craft did not avail themselves of that provision. There was a sufficient seizure.

Sir Erle Richards K.C. and *Balloch* for the liquidator. There was not a seizure, or if there was it was after the writ—namely, on August 8, 1916; the Prize Court consequently had not jurisdiction. There must be an act of seizure as well as the issue of a writ: *The Roumanian.* (3) To amount to a capture there must be some act which was intended to be a seizure in prize: Hall's International Law, 1917 ed., par. 158. The correspondence between the Procurator and the liquidator refers to August 8, 1916, as the date of seizure, thus showing that what was done earlier was not regarded by the parties as a seizure. Further, the craft being all in the canal or its ports were protected from seizure by art. IV. of the Suez Canal Convention. The German Prize Code by s. 3 (*a*) (*a*) treats that article as giving immunity from capture in the canal. The craft were not before seizure ejected from the canal, as in *The Gutenfels* (4); nor were they using the canal as a port of refuge, as in *The Pindos.* (5) If there was a valid and effective seizure the Prize Court rightly held that by virtue of the Hague Convention No. VI., art. 2, the craft were only liable to detention. The craft were "navires de commerce" within the meaning of the Convention. That phrase, as there used, means every vessel which is not a "bâtiment de guerre" or a "navire d'état": see Proceedings of the International Naval Conference, 1909 (Blue Book,

(1) [1917] A. C. 375.
(2) Lloyd's List, Nov. 6, 1917.
(3) [1916] 1 A. C. 124, 130, 131.
(4) [1916] 2 A. C. 112.
(5) [1916] 2 A. C. 193.

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Cd. 4555), p. 221. The tugs, at any rate, were within the article, for they had come out from Hamburg under their own steam. [Reference was also made to *The St. Tudno* (1) and Jal's Glossaire Nautique.] The decree of the Egyptian Government of August 5, 1914, was conditional upon the crews not serving during the war. That condition was unreasonable and improper, and prevented the days of grace being operative. *The Concadoro* (2) is, therefore, distinguishable. The craft should not, however, have been even detained. They were "bateaux exclusivement affectés à des services de petite navigation locale," and were, therefore, exempt from capture by the Hague Convention No. XI., art. 3. Further, the company had been licensed to carry on its business in Egypt; it was thereby exonerated from the disabilities of enemy nationality: *Princess Thurn and Taxis* v. *Moffitt* (3); *Leader* v. *Direction der Disconto Gesellschaft*. (4) [As to jurisdiction in inland waters reference was made to the Institute of International Law Annuaire (Oxford, 1913), pp. 367, 600.]

G. T. Simonds in reply. The decree recites that the craft had been seized, and that is sufficient. But if not, the further evidence shows that there was a sufficient seizure. The craft were throughout in the possession of the liquidator on behalf of the Crown no formal act of seizure was therefore necessary. But in any case the agreement between the Procurator and the liquidator amounted to a seizure. The fact that no objection was taken by the respondents at the trial, or subsequently, shows that the intention of all parties was that the craft should be subjected to the jurisdiction of the Prize Court. In *The Germania* (5) the Board rejected the contention that "navire de commerce" included every kind of vessel which was not a "navire d'état." There was no exercise of a "right of war" in the canal within art. IV. of the Suez Canal Convention. The seizure would have been effective even if it had been in breach of that article: *The Sudmark*. (6)

(1) (1916) 2 Br. & Col. P. C. 272.
(2) [1916] 2 A. C. 199.
(3) [1915] 1 Ch. 58, 61.
(4) [1915] 3 K. B. 154.
(5) [1917] A. C. 375.
(6) [1917] A. C. 620.

[Argument as to the effect of the licence was not required.]

Dec. 13. The judgment of their Lordships was delivered by LORD SUMNER. The Vice-Admiralty Court at Alexandria decided this case on the application of the Hague Convention, numbers VI. (arts. 1 and 2) and XI. (art. 3). The learned judge held that the craft in question were not immune from seizure, but only made a detention order against them. Accordingly there are cross-appeals. One party claims condemnation, the other immediate release. Each prepared his case on the assumption that there had been a valid seizure, and only sought to inquire which Convention, if either, applied; for if neither was applicable, condemnation followed.

During the hearing it appeared that the record contained no account of the circumstances of the seizure, nor indeed expressly alleged any seizure at all; and although it might have been enough to have relied upon the recital in the decree under review, that the various craft were "lawfully seized as good and lawful prize," on such a point their Lordships were reluctant to refuse examination into the facts, when a doubt was brought to their notice. Accordingly they directed that further information should be obtained from Egypt. The material now forthcoming is neither as explicit nor as simple as might have been expected.

Before the war the business of the Deutsches Kohlen Depot Gesellschaft in Egypt was to coal steamers passing through the Suez Canal. They owned a large fleet of lighters, with the tugs required to tow them. Most of them were of steel, but a few were of wood. Four were water tank boats and the rest chiefly coal barges. There were also, for general communication between ship and shore and for harbour business, three fast launches. The tugs were about 57 by 14 feet; their tonnage was about 27 tons, and their engines must have been of high power. The lighters, 74 in number, ranged from 82 by 20 feet to 46 by 10 feet. Their average tonnage was nearly 130 tons. Where they were built is not stated, though it is reasonable to suppose that all of

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them, except perhaps the wooden barges, had come out from Germany, but whether afloat or not is unknown. The tugs were capable of making open sea voyages; but, in fact, were only employed in Port Said harbour. The lighters were boxes only, with hardly any decks or freeboard; and, as they stood, were incapable of taking the open sea.

When war broke out the company's business was for some time allowed to proceed as before. About the end of 1914 some of the lighters were requisitioned, and in October, 1915, a licence was granted to the company to continue supplying the rest to the British Coaling Co., Ld. At the end of April, 1916, this licence was revoked, and an official was appointed by the General Officer Commanding in Egypt, as receiver of the business, "with instructions to liquidate the same." He is styled "the liquidator"; and, in the name of the Deutsches Kohlen Depot Gesellschaft, is respondent to this appeal. The proclamation under which he was appointed appeared in the "Journal Officiel Extraordinaire" of January 25, 1915, and provided that "every receiver shall have such powers as shall be prescribed in his instructions for managing the property entrusted to him"; but he appears to have been simply placed under the control of the licensing officer, to whose order he was bound to conform. His position was thus very different from that of a liquidator appointed in legal proceedings. His principal function appears to have been to hold possession of such of the craft as were not from time to time in the use and possession of the naval and military authorities, and with them to supply the requirements of the British Coaling Co., Ld., as far as he could. Though variously employed, and in various places, the several craft have throughout been treated as one coaling fleet and as an installation for a single business, physically divisible into units, but managed as a whole.

During the early part of the war the Procurator in Egypt, the present appellant, had been fully occupied in taking proceedings against numerous ships and cargoes in the Vice-Admiralty Court of Alexandria; but at length in the spring of 1916 he decided to seek the condemnation of the

fleet of the Deutsches Kohlen Depot Gesellschaft. He did not wish actually to lay hands on the individual units. They were numerous; they often had no one on board; some were here, some there; most of them were no doubt in the harbours of Port Said or Suez; but some were up the Canal, and all were being usefully and indeed indispensably employed for military, naval, or commercial purposes. He had also to consider, no doubt, the terms of the Suez Canal Conventions, since the course pursued in the case of *The Pindos* (1) was inapplicable to a fleet of such a size and character. Such of the craft as were not already in the hands of the naval and military authorities were in the possession of the liquidator, though physically scattered up and down.

In May, 1916, the Procurator instructed the marshal of the Prize Court to report to him on the company's floating craft, and asked the liquidator to furnish a list of them in June. In July he saw the liquidator, and intimated, to quote his affidavit, "that I proposed to take proceedings against the craft, and owing to the difficulty in serving on the particular craft, I would ask for an order for substituted service on him. It was then agreed between us that, as liquidator, he should, on proceedings being taken, continue to hold such of the tugs and lighters as were in his possession at the disposal of the Crown and the Prize Court. I also arranged with Mr. Bristow, manager of the British Coaling Depots, and with Mr. Lloyd Jones that the manipulation contract, which was being carried on by the liquidator, should continue to be so carried on as between the Crown and the Coaling Depots." He further informed the licensing officer what he desired to do, and with him "came to an understanding that the liquidator should hold the craft and continue to act on behalf of the Crown from the time the proceedings were instituted against the craft."

What, then, is the fair conclusion from all this? It is clear that the Procurator meant to bring this fleet before the Prize Court with a view to its condemnation, and his general intention must have been to do whatever was necessary

(1) [1916] 2 A. C. 193.

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to give the Court jurisdiction. He desired to avoid taking physical possession of the craft seriatim, yet he equally desired that all should be validly seized. The liquidator, Mr. Lloyd Jones, had them under his control, and those which were not already in the hands of the naval and military officers of the Crown were being used by Mr. Bristow, above mentioned. The liquidator does not contradict the Procurator's evidence, and in prosecuting his cross-appeal did not question that the Vice-Admiralty Court had jurisdiction.

Their Lordships take the possession respectively of the naval and military authorities and of the liquidator to have been, by agreement, the possession of the marshal of the Prize Court until proceedings were taken, and thereafter to have been "continued" on behalf of the Court, the actual requirements of the Forces and of the British Coaling Co. being satisfied in the meantime and till further order. It is as though the Procurator had pointed to the fleet, assembled in the harbour under the liquidator's eyes, and had said: "Submit to treat this fleet as seized and undertake to do with the vessels as the Court and its marshal may direct, or I will at once use force, which I have at hand."

Their Lordships do not overlook the facts that both the Procurator and the liquidator elsewhere seem to suggest that the question was rather one of service of proceedings in rem than of capture, for they give August 8, 1916, as the date of the seizure, which was actually the date when substituted service was effected on the liquidator. The liquidator, however, was chiefly concerned with his disbursements, and it was in this connection that the date of seizure was given to, and accepted by, the Court as August 8 on an interlocutory application. Their Lordships do not think this sufficient to negative the inference to be drawn from the Procurator's account of his agreement with the liquidator, and as their Lordships are not asked to suppose that the Procurator completely overlooked the importance of seizure, they conclude that a sufficient seizure having been arranged by consent, the matter subsequently received no further attention

This view of the facts disposes of two other matters. In spite of a general statement, made on the application for leave to effect substituted service, that the craft to the number of 85 were in various places along the canal and constantly changing their position, no evidence is forthcoming to enable any one lighter to be discriminated from the rest, and the coal barges must for the most part have been kept in the harbours of Port Said and Suez. Sir Erle Richards, for the liquidator, stated to their Lordships that, on the present materials, he could not ask for a decision that the craft were seized in inland waters, and were not the subjects of maritime prize at all; and, indeed, such a contention would have precluded the liquidator from obtaining a judicial decision on the effect of the Hague Convention, which is the true issue in the case, and in strictness the only issue which can be presented as of right in the interest of an enemy company. As no point of this kind was made at the hearing, their Lordships will deal with the whole fleet as having been enemy property seized in port, and, as such, liable to be condemned in a Court of Prize.

The liquidator further contended that the seizure in any case was bad, as being a breach of the Suez Canal Convention, 1888, art. IV. It does not, however, follow that a seizure, otherwise good, must be invalid for all purposes merely because it contravenes some term in an international instrument cognizable in a Prize Court. It is legitimate to consider the object with which the Convention was entered into, the scope of its provisions, and the mischief which it was intended to prevent. As was pointed out in *The Sudmark* (1), this Convention does not stipulate any penalty for its infraction, and a Court of Prize is not warranted in creating a penalty where the Convention creates none, or in declaring a seizure to be bad because in no other form could it effectively create a penalty at all. Again, their Lordships cannot forget that, long before the seizure in the present case took place, the Canal generally had been made a field of battle by the armies of the Sublime Porte, acting in alliance with those of the

(1) [1917] A. C. 620, 623.

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German Emperor, and for want of mutuality alone the Convention could not be used to protect the property of an enemy whose sovereign had already fundamentally disregarded it. There is, however, on the facts a simpler means of disposing of the point under the terms of art. IV.: "Aucun droit de guerre ne pourra être exercé dans le canal et dans ses ports d'accès." In the present case the exercise of any right of war in the canal was carefully avoided. What was done, though constituting a seizure for the purposes of Prize jurisdiction, was done ashore by word of mouth, and involved no belligerent conduct in the canal or its ports of access contrary to the Convention. The de facto tranquillity, which in the interest of neutrals the Convention secures, was fully respected. The interests of neutrals do not demand that acts done in Egyptian territory, which do not affect the canal or its ports of access, should be invalidated on the mere ground that they took place in its neighbourhood.

To turn to the Hague Conventions, can these tugs and lighters be covered by the words of Convention XI.: "Bateaux exclusivement affectés à des services de petite navigation locale"? For some reason, which is not apparent, the French text makes the element of size a quality of the service in which the craft are engaged; in the English it is a quality of the craft themselves. In the present case it is difficult to describe either the craft or the navigation in which they engage as small. As applied to the navigation the words evidently predicate of it a petty, local character. These craft are an integral and indispensable adjunct of most important ocean voyages, and without them voyages through the Suez Canal would be impracticable. Their service is the reverse of petty or local. Nor are the craft themselves truly small. The tugs must be of high power, and their mere tonnage and dimensions are therefore not decisive. Few of the barges are even of modest size; none are insignificant, and most of them are of ample burden. Their Lordships will not imitate the learned judge below in treating the penury or the opulence of those engaged in the traffic as determining the claim of the craft to protection, though this feature may

not be without its importance; but they are satisfied that, whatever be the precise limits of this article, it was never contemplated that such craft as these should fall within them, and they think the same of the argument that they can be assimilated to fishing boats, so as to entitle them to the tenderness which has often been extended to fishermen under international law.

The application of the Sixth Convention does not depend merely on the question whether the craft now in question can, or cannot, be styled "navires de commerce" with tolerable propriety. The construction of the article, which would bring under that term all floating structures not "navires d'état," was rejected by their Lordships in *The Germania* (1), and in delivering the opinion of the board Lord Parmoor observed: "There is nothing in the context of art. 2 which would suggest that the expression, 'un navire de commerce,' includes every class of private vessel." It would be a mistake to seek in the Hague Conventions, or in the terms there employed, exhaustive categories of every kind of "bâtiment" afloat, or to suppose that, taken collectively, the bateaux, bâtiments, and navires there mentioned cover the whole field of possible means of carriage by water, so as to make provision somewhere or other for each and all of them. Conventions concluded between nations so diversely interested rest principally on compromise, and cannot be expected to exhibit the comprehensiveness of a code.

The language of the general preamble to Convention VI. is of importance, but the actual text must come first. The articles contemplate ships—navires de commerce—which in the course of a voyage from a port of departure or to a port of destination enter a port and there find themselves entangled in hostilities of which they were unaware, or ships, also commercially engaged upon a voyage, finding themselves in a port, whether of loading, of call, or of discharge, which by the outbreak of war becomes an enemy port, and they provide days of grace in order that such ships may have their chance to go in peace, and deal specifically with the

(1) [1917] A. C. 375, 378.

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case, in which force majeure prevents them from availing themselves of this opportunity. The picture so drawn is plain, and if there are vessels entitled to the designation of navires de commerce which lie outside of this picture, then the scope of the article affords them no assistance, be their designation or their classification what it will. Neither collectively nor individually was the fleet of the Deutsches Kohlen Depot engaged in, or between, ports of departure and discharge. It did not find itself in Port Said in the course of a voyage. Port Said was its home, nor had it any other. No force majeure affected it. In point of fact, after the outbreak of war it went on with its regular employment in its permanent home as before, and no opportunity for departure was desired, for there was neither the intention nor the means of taking it elsewhere. This fleet was the very opposite of the navires de commerce referred to, and was as fixed in its habitat and in its orbit as trains of coal trucks from which steamers take their coal under a trip. If so, it is unnecessary to express an opinion whether they could be called navires, and, if so, whether they were also navires de commerce. To them Convention VI. had no application at all.

In the alternative, but only in the alternative, the question arises whether any benefit could be claimed under the Convention for craft which did not avail themselves of the days of grace, and were not prevented by force majeure from doing so. The "Décision" of the Egyptian Government, dated August 5, 1914, gave permission to German ships which found themselves in Egyptian ports at the outbreak of hostilities to quit the port up to sunset of August 14. Let it be that some of these craft could not go, because they were not built for sea, though no doubt with some alterations they could have been made fairly seaworthy; let it be that none of the members of the fleet had any business or occupation elsewhere. This does not secure to them the benefit of the Convention without complying with its terms; it is only ground for saying that they are not within the scope of the Convention at all. They remained in the port, and continued

their usual employment, and took the risk involved in the fact that by art. XIII. of the same Décision " les forces navales, et militaires de Sa Majesté Britannique pourront exercer, tout droit de guerre " in Egyptian waters, apart, of course, from the terms of the Suez Canal Convention. Remaining where they were conferred on them no irrevocable permission to stay and trade, no permanent immunity from the belligerent rights of the Crown. Later on a licence was applied for and obtained, but before the seizure that licence had been duly revoked. Thereafter, at any rate, the liquidator could not invoke for their protection the principle that " when persons are allowed to remain either for a specified time after the commencement of war, or during good behaviour they are exonerated from the disabilities of enemies for such time as they in fact stay " : *Princess Thurn and Taxis* v. *Moffitt* (1), even if such a principle is applicable to personal property only, when no enemy person is actually present or in charge of it.

In the result the appeal succeeds, and should be allowed, and the cross-appeal fails, and should be dismissed, in each case with costs. The decree of condemnation must be amended by omitting the words " and that the said tugs, lighters, motor boats, and floating craft be detained until further order of the Court," as well as the subsequent words " and detention," and the subjects seized must be forthwith condemned and confiscated.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant : *Treasury Solicitor.*
Solicitors for respondents : *Botterell & Roche.*

(1) [1915] 1 Ch. 61.

[HOUSE OF LORDS.]

H. L. (E.)* 1918 Dec. 2.

LIONEL BARBER AND COMPANY, LIMITED . . . . . } Appellants;

AND

DEUTSCHE BANK (BERLIN) LONDON AGENCY . . . . . } Respondents.

ET E CONTRA.

Libel—Excessive Damages—Misdirection—New Trial—Rules of the Supreme Court, Order XXXIX., *r.* 6.

In an action for libel for statements alleged to have been published by the defendants in regard to the nonpayment of several bills of exchange accepted by the plaintiffs and held by the defendants, the plaintiffs proved two libels in respect of one of the bills. In regard to the other bills the plaintiffs proved items of special damage amounting to 460*l.* arising from the statements complained of, but failed to prove that the defendants were responsible for those statements. The trial judge, in summing up, directed the jury to disregard the statements in the other bills; but, in dealing with the damages, told them—apparently by inadvertence—that they might consider the items of special damage. The jury returned a verdict for the plaintiffs for 3000*l.*, and judgment was entered accordingly. The Court of Appeal having (wrongly as the House held) ordered judgment to be entered for the defendants, the plaintiffs asked that the verdict and judgment in their favour should be restored, and the defendants asked for a new trial on the ground of excessive damages.

The plaintiffs consenting to a reduction in the amount of damages awarded by 460*l.*:—

Held by Lord Finlay L.C., Viscount Haldane and Lord Shaw of Dunfermline (Lord Atkinson and Lord Phillimore dissenting), applying Order XXXIX., r. 6, of the Rules of the Supreme Court, that, inasmuch as the misdirection had occasioned no substantial wrong or miscarriage, a new trial ought not to be ordered, but that the judgment in the plaintiffs' favour ought to be restored, subject to the reduction agreed to by the plaintiffs.

Bray v. *Ford* [1896] A. C. 44 and *Watt* v. *Watt* [1905] A. C. 115 distinguished.

Decision of the Court of Appeal reversed.

APPEAL and cross-appeal from an order of the Court of Appeal, setting aside a judgment and verdict obtained by the appellants (plaintiffs) at the trial of an action for libel

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PHILLIMORE.

before Sankey J. and a special jury, and directing judgment to be entered for the respondents.

The facts, which are fully stated in the judgment of the Lord Chancellor, may be shortly summarized as follows: The appellants on the original appeal (hereinafter called the appellants) were merchants of Liverpool, and traded with South America. The respondents on the original appeal (hereinafter called the respondents) were a German banking company, having their head office in Berlin and a branch establishment in London. Goods bought and shipped by the appellants in South America were paid for by negotiating with the Banco Aleman Transatlantico—a bank having its head office in Berlin with a number of branch establishments in South America—drafts drawn by the sellers upon the appellants, and these drafts were forwarded by the said bank to the respondents, by whom they were presented to the appellants for acceptance and eventually for payment.

The libels complained of by the appellants had reference to the nonpayment of eight bills of exchange accepted by the appellants and held by the respondents. The first of these bills was No. 19,317, drawn by Venn, Vargas & Co. In the ordinary course this bill would have become payable on October 9, 1914; but in consequence of the moratorium occasioned by the outbreak of the war the due date for payment became November 9, 1914, and the bill was reaccepted by the appellants on October 22, and was duly paid on November 9. The libels complained of in respect of this bill were two. The first was a cable message sent by the respondents on October 14, 1914, to the Banco Aleman Transatlantico as follows: "No. 19,317 unpaid." The second was contained in a diary letter sent by the respondents to the same bank on October 21, 1914. It contained the following passage:

"Your unpaid remittance No. 19,317 on J. Lionel Barber & Co., London, as per our cable of October 14; we have taken divers steps in order to obtain settlement, but so far our efforts have been without result. The matter still occupies our attention, and we hold the bill here at present." The respondents by their defence admitted publication of these

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statements, but denied that they were capable of any defamatory meaning; and, alternatively, they pleaded that the statements were published on a privileged occasion and without malice. The appellants also complained of similar libels in respect of seven other bills, but these they failed to prove. The Banco Aleman Transatlantico wrote to three South American customers of the appellants that they had received a cable from the respondents that these other drafts were unpaid, and as a result of these statements the appellants proved several items of special damage amounting in the aggregate to 460*l.*, but they failed to prove that any such cable had been sent by the respondents as alleged.

Sankey J., in his summing up, after dealing with the libels in respect of bill No. 19,317, told the jury to disregard the statements as to the other seven bills, but in dealing with the question of damages he told them—apparently by inadvertence—that they might take into consideration the items of special damage, 460*l.* in all.

The jury found that the words complained of were defamatory, and that the respondents were actuated by express malice, and awarded the appellants 3000*l.*; and the learned judge entered judgment accordingly.

The Court of Appeal, by a majority (Pickford and Scrutton L.JJ., Lord Reading C.J. dissenting), directed judgment to be entered for the respondents on the ground that there was no evidence of express malice. Lord Reading thought there should be a new trial on the ground of the misdirection of the judge on the question of damages, and the other members of the Court, on the assumption that they were wrong on the question of malice, concurred in this view.

The appellants asked that the judgment of Sankey J. should be restored; the respondents by their cross-appeal asked that, in the event of the judgment of the Court of Appeal being reversed, there should be a new trial.

At the Bar of the House the appellants by their counsel consented to a deduction of 460*l.* from the judgment obtained by them at the trial.

Oct. 28, 29, 31; Nov. 1, 1918.

Rigby Swift K.C. and *G. D. Keogh* for the appellants.

The words complained of were reasonably capable of bearing a defamatory meaning, and the jury have found that they were defamatory. Upon the question of express malice there was evidence to support the verdict of the jury. [They referred to *Simpson* v. *Robinson*. (1).] There is no ground for granting a new trial on the question of damages. If the jury were influenced at all by the mistake of the judge as to the 460*l*., it could not have had the effect of swelling the damages to any larger extent than that sum, and the damages were not excessive, whether that sum was included or not: *Rolin* v. *Steward*. (2) The appellants are willing to deduct the 460*l*. from their judgment; and as the misdirection has not led to any miscarriage they are entitled to retain the judgment they obtained at the trial subject to that deduction: *Moore* v. *Tuckwell* (3); R.S.C. Order XXXIX., r. 6.

[The Lord Chancellor referred to *Watt* v. *Watt*. (4)]

Sir John Simon K.C. (with him *Schiller K.C.* and *Sir Hugh Fraser*) for the respondents.

The words complained of were not reasonably capable of being understood in a defamatory sense, having regard to the persons to whom they were addressed: *Bendle* v. *United Kingdom Alliance*. (5) Any reasonable bank must have understood the respondents' meaning. The appellants have been vilely treated, but by the Banco Aleman Transatlantico, not by the respondents. There was here no evidence of express malice. Express malice means that there has been an abuse of the privileged occasion. The question is not whether the respondents' letter is unfortunately worded or is misleading or incorrect, but whether it is designedly or maliciously incorrect or misleading: *Adam* v. *Ward*. (6) At any rate, the respondents are entitled to a new trial as to damages, on the principle of *Johnston* v. *Great Western Ry.*

(1) (1848) 12 Q. B. 511.
(2) (1854) 14 C. B. 595.
(3) (1845) 1 C. B. 607.
(4) [1905] A. C. 115.
(5) (1915) 31 Times L. R. 403.
(6) [1917] A. C. 309, 330.

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Co. (1) That case, qualifying the rule laid down in *Praed* v. *Graham* (2), shows that a new trial may be granted if the Court, without imputing perversity to the jury, comes to the conclusion, from the amount of the damages and the other circumstances of the case, that the jury must have taken into consideration matters which they ought not to have considered. The defect here is that the jury have arrived at a total on the basis of a direction calling their attention to four items of damage, none of which was proper to be included. The total includes wrong elements. The fact that 3000*l.* is not per se excessive does not deprive the respondents of their remedy for the erroneous direction to the jury. The 460*l.* cannot be lawfully taken out of the 3000*l.* and judgment entered for the balance, because (*a*) no jury has found a verdict of 2540*l.* damages against the respondents; (*b*) the effect of the misdirection is not limited to raising 2540*l.* to 3000*l.* The true rule is laid down in *Watt* v. *Watt* (3), which is precisely this class of action. *Bray* v. *Ford* (4) is also in point. Order XXXIX., r. 6, does not apply.

G. D. Keogh contra (called upon only as to the question of a new trial). In order to justify the Court in granting a new trial, either there must be some misdirection or the damages must be excessive. Omitting the few words in the summing up there is here no misdirection, and these words must be taken with what was said in the course of the trial and in other parts of the summing up. Assuming there has been a technical misdirection it has led to no injustice. The appellants are entitled to keep the judgment less the 460*l.*, which they are willing to deduct.

Sir John Simon K.C. replied upon the cross-appeal.

The House took time for consideration.

Dec. 2. LORD FINLAY L.C. My Lords, This appeal and the cross-appeal arise out of an action for libel brought by Lionel Barber & Co., Ltd., against the Deutsche Bank (Berlin)

(1) [1904] 2 K. B. 250.
(2) (1889) 24 Q. B. D. 53.
(3) [1905] A. C. 115, 119, 121.
(4) [1896] A. C. 44.

London Agency. The case was tried before Sankey J. and a special jury of the City of London, and resulted in a verdict for the plaintiffs for 3000*l.* damages. The defendants appealed to the Court of Appeal, which, by a majority, directed that the verdict and judgment should be set aside, and that judgment should be entered for the defendants. The plaintiffs have appealed to this House, asking that the verdict and judgment for 3000*l.* damages should be restored. The defendants brought a cross-appeal asking that if the judgment entered in their favour by the Court of Appeal should be set aside a new trial should be directed.

The appellants are merchants. Their head office is in Liverpool, and they do a large business with South America. The libels proved were two. The first was a message by cable sent by the respondents on October 14, 1914, to a bank carrying on business in South America called the Banco Aleman Transatlantico, in the following terms: "No. 19,317 unpaid." The second of the libels was contained in a diary letter sent by the respondents to the same Banco Aleman Transatlantico on or about October 21, in which the following passage occurs: "Banco Aleman Transatlantico, Lima, in account with the Deutsche Bank (Berlin) London Agency, London. 5.10.1914.

"Your unpaid remittance No. 19,317 on J. Lionel Barber & Co., London, as per our cable of October 14. We have taken divers steps in order to obtain settlement, but so far our efforts have been without result; the matter still occupies our attention, and we hold bill here at present. Debit Value 1,000*l.* 9*s.* 10*d.*"

The Bill No. 19,317 mentioned in the cable and in the letter had been drawn upon the appellants by a South American correspondent and negotiated by the drawer with the Banco Aleman Transatlantico, and afterwards transmitted by them to the respondents in London to be presented to the appellants for acceptance and payment. In ordinary course that bill would have been payable on October 9, 1914, but, owing to the moratorium instituted on occasion of the war, its due date became November 9. It was presented for payment to the appellants' bank on October 9, and was returned noted "Refer

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to acceptor under terms of Proclamation of August 2." Libels on the appellants were also alleged to have been published by the respondents with reference to several other bills in similar circumstances, but no evidence was given of these alleged libels. The case, therefore, depends upon the cabled message of October 14, and the letter sent on or about October 21 as above stated. The Statement of Claim alleged that by the said documents the defendants meant and were understood to mean that the bill to which they related had been dishonoured by the plaintiffs. It was contended for the defendants that the words were not capable of bearing a defamatory meaning, and that, the occasion being admittedly privileged, there was no evidence of express malice. Sankey J. left three questions to the jury: (1.) "Were the words complained of defamatory?" (2.) "Were the defendants actuated by express malice?" and (3.) "If you are in favour of the plaintiffs, what damages?" The jury answered the first and second questions in the affirmative, and assessed the damages at 3000*l.* The case was afterwards heard before Sankey J. on further consideration, and he gave judgment to the effect that the words were capable of a defamatory meaning, and that there was evidence of express malice, and entered judgment for the plaintiffs for the amount found by the jury—3,000*l.* In the Court of Appeal the defendants again argued that the words were not capable of a defamatory meaning. All the members of the Court of Appeal—the Lord Chief Justice, Pickford and Scrutton L.JJ. —agreed with Sankey J. in holding that the words were capable of a defamatory meaning. This appears to me to be obviously right, and I think it unnecessary to add anything to what was said on this point in the courts below. On the second question as to express malice the Court of Appeal was divided in opinion. The Lord Chief Justice was of opinion that there was evidence of express malice, while the other two members of the Court held that there was none. On this point I agree with the Lord Chief Justice. The officials of the Deutsche Bank, who were responsible for the publication of these libels, must have known that they were calculated to convey the impression that the draft had been dishonoured

by Messrs. Barber, and that such an imputation was likely to damage their credit. The statement in the second of the two libels, to the effect that the Deutsche Bank had taken divers steps to obtain a settlement, but so far without result, was calculated to suggest that the firm was in pecuniary difficulties. All the facts were within the knowledge of the officials of the Deutsche Bank, and it is quite impossible to suppose that they believed that any inference unfavourable to the financial position of Messrs. Barber could properly be drawn from the fact that the bill, which was subject to the moratorium, had not been paid on the date on which, but for the moratorium, it would have been due. When the attention of the Deutsche Bank was called to the matter it would have been quite easy to send a cable stating in plain terms that there was no ground for any imputation, and that the nonpayment of the bill on October 9 was explained by the moratorium. The manager of the Deutsche Bank stated that he would set things right, but all that was done was to cable that the bill had been reaccepted. This was manifestly not enough to undo any mischief that had been done by the libels. These two circumstances—that the Deutsche Bank knew that the communications were calculated to convey a false impression, and that nothing effectual was done to carry out their promise to set things right—are, in my opinion, evidence of express malice which could not properly have been withdrawn from the jury. It follows that the direction given by the majority of the Court of Appeal that judgment should be entered for the Deutsche Bank is erroneous, and must be set aside.

There remains only the question of damages, which has been the subject of prolonged argument before your Lordships. It has been contended on behalf of the Deutsche Bank that there was misdirection in the summing up of the learned judge on the question of damages which entitles them to a new trial. As I have already stated, there were, in addition to the bill to which the libels proved had relation, seven other bills, in respect of which it was alleged, in the statement of claim, that the Deutsche Bank had libelled Messrs. Barber. In anticipation of being able to prove these other libels, possibly on

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the cross-examination of the defendants' witnesses, evidence had been given of special damage to the amount of 460*l.*, which was said to have resulted from such libels. The Deutsche Bank, however, called no witnesses, and there was no evidence forthcoming to prove these other libels. It is pressed on behalf of the Deutsche Bank that they are entitled to a new trial, on the ground that Sankey J. improperly directed the jury that they might take into account in assessing the damages for the libels in respect of bill No. 19,317 special damage which must have resulted from the unproved libels, if it was traceable to the Deutsche Bank at all.

Sankey J., in the course of his summing up, stated to the jury at length the facts with reference to the two libels which had been proved. His narrative of the facts extends from page 257 to page 266 of the Appendix. He then proceeded to refer to the other seven bills, libels with regard to which, though alleged, had not been proved. He said: "Now, gentlemen, I have nearly finished the facts of the case, but I must say a word or two about the other seven bills, because you know, as Mr. Rigby Swift pointed out to you in his opening remarks, there are eight bills which are made the subject of this inquiry, but he very frankly admitted with regard to seven of them he was not in a position to give conclusive proof. I do not think that is a matter that you need trouble very much about. He claims to have discovered this morning, or rather last night, by a telegram of November 14, some evidence in the letter which was referred to in that telegram with regard to the second of the two bills, but if I might again advise you, it really does not make very much difference, because one libel of this sort is a serious thing, if it were a libel, and if the defendants are liable for it, and therefore, if I may advise you, I do not think I should pay very much attention to the other seven bills which are the subject-matter of this action." It is obvious that the learned judge directed the attention of the jury to the libels which were proved, and I cannot read anything in the summing up so far to justify the contention that he invited the jury to give damages in respect of the unproved libels.

The passage which was really complained of in the summing up occurs near the end, where the learned judge is dealing with the question of damages, and it runs as follows: "I now turn to the damages. I am not going to delay about damages. Everyone of you gentlemen knows more about damages than I do; certainly twelve heads are better than one. They have proved special damage about 460*l*. If you find they are entitled to damages—of course it is a serious thing to injure a man in his trade—Mr. Barber gave several instances. There was the instance of the cables, the Corocoro Company, the Banco Mercantil and Valenzuela. Those make the 460*l*. And then he said: 'Well, it is a very unfortunate thing for me, because at this time there was a lot of new business to be got in South America, and I was not, so to speak, in on the ground floor. There was a lot to be done there, and just at the time I could have picked up a lot of things there came this unfortunate suspension of my credit, and people got to know of it, and I must have lost a lot of money and a lot of custom.' That is a matter entirely for you." The statement by the learned judge that the plaintiffs had proved special damage—about 460*l*.—was obviously erroneous. It must have been the result of a slip, and I think it unfortunate that the attention of the learned judge was not directed to it at the time, in which case it would at once have been set right. The items making up the 460*l*.—namely, the cable, the Corocoro Company, the Banco Mercantil and Valenzuela—were not proved to have any connection with any defamatory statement made by the Deutsche Bank. The 3000*l*. damages given by the jury might well have been given as damages in respect of the two libels which were proved at the trial; and considering the serious effect which imputations on the financial credit of a mercantile house may have, they could not in my opinion have been said to be in any way excessive. I agree with the respondents' contention that there was misdirection in this passage of Sankey J.'s judgment. It must remain doubtful, however, whether it had any effect at all upon the damages. But it is possible that it may have had the effect of leading the jury to give 460*l*. more than they

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otherwise would have given, and the counsel for Messrs. Barber & Company, therefore, consents to reduce the verdict by 460*l.* The counsel for the Deutsche Bank objected to this course on two grounds. In the first place, they alleged that it is not competent to any Court to reduce the damages, and that the case must be sent down for a new trial, even if your Lordships should be of opinion that the misdirection could not have affected the damages beyond 460*l.* In support of this contention they relied upon the decision of this House in *Watt* v. *Watt* (1), overruling the decision of the Court of Appeal in *Belt* v. *Lawes.* (2) In the latter case it was held by Brett M.R., Baggallay and Lindley L.JJ., in an action for libel in which 5000*l.* damages had been given, that the Court was entitled to refuse a new trial on the consent of the plaintiff that the damages should be reduced to 500*l.* The Master of the Rolls said in the course of his judgment: "Where the complaint is only that the damages are excessive and the verdict cannot be otherwise impeached, and it is a case where the plaintiff is entitled to substantial damages, the Court has power to refuse a new trial, without the consent of the defendant, on the plaintiff's consenting to the amount of damages being reduced to such an amount as, if it had been given by the jury, the Court would not have considered excessive." With this the other members of the Court of Appeal agreed. But in *Watt* v. *Watt* (1) it was decided by this House that the course taken by the Court of Appeal in *Belt* v. *Lawes* (2) was erroneous, and that the defendant was entitled to insist on his right to have the case reheard by another jury, the constitutional tribunal for assessing damages.

Does the present case fall within the decision given in this House in *Watt* v. *Watt*? (1) In other words, does it result from *Watt* v. *Watt* (1), if there has been any misdirection on the question of damages, even if it appears to the Court of Appeal or to this House that the effect of the misdirection (if it had any effect at all) would not extend beyond a particular amount, that the defendant is entitled to insist on a new trial of the action, although the plaintiff offers to redress any

(1) [1905] A. C. 115. (2) (1884) 12 Q. B. D. 356, 357.

injustice which may have resulted from the misdirection by reducing the amount of the verdict? I do not think that the decision in *Watt* v. *Watt* (1) carries this consequence with it. In that case 5000*l.* had been given as damages in an action for libel. The Court of Appeal made an order that there should be a new trial, unless the plaintiff consented to the damages being reduced to 1500*l.* The plaintiff consented, and the judgment was amended accordingly. That is a very different case from the present. The reduction made in *Watt* v. *Watt* (1) must have proceeded on the assumption that the Court of Appeal had the right to assess what would be reasonable damages for the libel, and their assessment was at 1500*l.* In the opinion of the House of Lords this involved an invasion by the Court of the province of the jury as to the assessment of damages. In the present case, if the fair conclusion is that the misdirection cannot have increased the damages beyond the amount of 460*l.*, it is in my opinion open to this House, as it would be to the Court of Appeal, with the consent of the plaintiff, to reduce the damages by that amount so as to prevent the possibility of any injustice to the defendant. This would not involve any assessment of damages for libel by a tribunal other than a jury, but only the deduction of the sum which may possibly have been added to the amount of the verdict, owing to the misdirection of the learned judge at the trial.

The decision of this House in another case was cited to us: *Bray* v. *Ford.* (2) That was a case of damages for a libel by the appellant on the respondent in respect of his conduct in the fiduciary position of chairman of the Yorkshire College. The judge at the trial directed the jury (wrongly in the opinion of the Court of Appeal and of this House) that the respondent under a certain clause in the memorandum of association was entitled to receive remuneration for his services as a solicitor. The jury gave a verdict for 600*l.* damages. The Court of Appeal refused a new trial, being of opinion that no substantial wrong or miscarriage had been occasioned by the misdirection, as the jury might properly, and would probably,

(1) [1905] A. C. 115. (2) [1896] A. C. 44.

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have given the same verdict, even if they had been rightly directed, and that, therefore, there had been no substantial wrong or miscarriage under Order XXXIX., r. 6. The House of Lords reversed this decision and ordered a new trial, on the ground that the assessment of damages in an action for libel is peculiarly within the province of the jury; and as they might have been influenced in their assessment by the misdirection, there had been a substantial wrong or miscarriage within the meaning of the rule. *Bray* v. *Ford* (1) is in the same category with *Watt* v. *Watt* (2), and is distinguishable from the present case on the same grounds.

The counsel for the Deutsche Bank further contended that a reduction of the verdict by the amount of 460*l.* would not meet the justice of the case, as it might be reasonably supposed that the effect of the misdirection might have been to inflame the damages by a greater amount. In effect, the counsel for the Deutsche Bank contended that the learned judge told the jury they might give damages in respect of libels which had not been proved. I cannot so read the summing up. The judge did say in the passage of the summing up which deals with the question of damages, that special damage had been proved to about 460*l.* This must mean that special damage to that amount had been proved to have resulted from the libels of which there was evidence. The mistake was as to the fact, there being no evidence to connect the special damage in question with the libels which had been proved. It seems to me extravagant to read this as a direction to the jury that they might give damages in respect of libels which, as the learned judge has told the jury, had not been proved. On the contrary, he merely made the mistake at the moment of supposing that these items of special damage had resulted from the libels proved.

Upon the whole I do not think that the respondents have made good their contention that the judge allowed the jury to think that they could give damages in respect of the bills not the subject of the libel proved. It appears to me, on the contrary, that the reasonable inference is that the misdirection

(1) [1896] A. C. 44. (2) [1905] A. C. 115.

did not influence the verdict, except possibly to the extent of 460*l.*

In my opinion the judgment should stand for the amount given by the jury, minus 460*l.*, the appellants consenting to this reduction. The appellants should have their costs here and below.

VISCOUNT HALDANE (read by LORD PHILLIMORE). My Lords, I will not recapitulate the facts.

I agree that on the question whether the words complained of ought to be understood in a defamatory sense, and whether there was evidence of malice, the appellants are entitled to succeed, and I have nothing to add to what has already been said about these points. But on the question whether the damages were excessive, in consequence of misdirection by the learned judge who tried the case, I have more difficulty. If he really directed the jury that the appellants had proved special damage to the extent of 460*l.*, which they were entitled to recover in respect of libels in reference to the bills, as to which libels no case against the respondents was established, then it is clear that there must be a new trial, because not only was there no right to the 460*l.*, but part at least of the general damages included in the verdict may then be attributable to these unproved libels. But did the learned judge in reality give the jury a direction to this effect on which he invited them to act? As to the supposed libels relative to the seven bills, it is beyond doubt that he told the jury clearly in the course of the trial that the statements in which the libels were contained were not statements of which the respondents were the authors, or for which they were responsible, and that at interviews which Mr. Barber had with Mr. Pannenborg, on and after December 8, 1914, the former had showed the latter the documents he had received from South America indicating that the Banco Aleman Transatlantico had made statements relative to the seven bills, other than Number 19,317, that of Venn, Vargas & Co. These statements Mr. Barber complained of as damaging to his company, inasmuch as they imputed that his acceptances had been dishonoured. Now there is no doubt that the

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documents were not evidence of the statements contained in them. But as they were shown to Mr. Pannenborg that fact of their existence was in evidence, and the jury were at liberty to infer that there were documents which indicated that the libel which was actually proved, that as to the failure to meet the bill of Venn, Vargas & Co., was one which had produced a serious impression in South America tending to the discredit of the appellant's position. This inference was the more reliable because of its non-contradiction by Mr. Pannenborg, who was not put into the witness box to rebut it. I am not satisfied that the special jury disregarded the direction of the learned judge that the allegations contained in these documents, as distinguished from the existence of the documents themselves, were not proved. It is no doubt true that at the end of his summing up he told the jury that the appellants had proved special damage amounting to 460*l.* This language was unfortunate, and was not warranted. But I am not at all sure that the special jury were actually affected by it. They found a verdict for 3000*l.*, and it is not suggested that this was an unreasonable amount to award as general damages for the single particular trade libel actually established. There is nothing to connect this amount with the 460*l.* or any other specific loss. It appears to have been given as general damages for the libel relative to the Venn, Vargas bill. There is no evidence of specific items making up the balance of the 3000*l.*, and I have seen nothing that satisfies me that the jury took the reference to the other seven libels and the documents which were produced by Mr. Barber to Mr. Pannenborg to afford instances of the injury his company was suffering, as more than a few instances, among what was probably a number of others, illustrating the consequences of the libel established as to the Venn, Vargas bill. Taking this view, I do not feel bound to hold that the action must go down for a new trial in respect of damages which, as given by the special jury, appear to me neither unwarranted by the circumstances nor unreasonable in amount. Whatever might have been the case under the old practice, the terms of Order XXXIX., r. 6, of the Rules of the Supreme Court of

1883, leave me free to avoid the conclusion that there must be a new trial. The rule says that a new trial is not to be granted on the ground of misdirection or the improper admission or rejection of evidence, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned; and if it appears to the Court of Appeal that such wrong or miscarriage affects part only of the matter in controversy, the Court of Appeal may give judgment only as to part thereof.

My Lords, if the question really were whether the 460*l.* could be deducted in this case, and the verdict treated as one for the balance only, I should feel much difficulty, in view of the decision by this House in *Watt* v. *Watt* (1) that the Court has no jurisdiction to assume the function of the jury by reducing the damages, and so giving a verdict itself, even with the consent of the plaintiff, if the defendant has not consented. But here it is not necessary to give a new verdict. The appellants, who were plaintiffs, are willing to forego judgment of 460*l.* of the amount the verdict awarded, without prejudice to their contention that the verdict was one for general damages, rightly arrived at, and not admitted to be excessive or to include wrong items. I think the case comes near the line, but I am content not to differ from those of your Lordships who think that deduction may be made in the judgment because of the assent given at the Bar by the appellants.

LORD ATKINSON. My Lords, I regret that I am unable to concur in the judgments which have been delivered by my noble and learned friends who have preceded me.

For the reasons given by them I think there was evidence to go before the jury upon which reasonable men, possessed of the knowledge possessed by those to whom the libels complained of were published, could properly have found that the respondents in writing and publishing them were actuated by malice in fact. I disagree, therefore, with the conclusion at which the Court of Appeal have arrived upon

(1) [1905] A. C. 115.

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this point. I concur with them, however, in the opinion that the publications were reasonably capable of a defamatory meaning, and I also concur with them in the conclusion at which they have arrived, to use the words of Lord Reading, "that it is indisputable that the jury were told to take into their consideration both special and general damage resulting from statements which were not made by the defendants, or for which they could not be made responsible." And I also concur with Pickford L.J., as he then was, in the opinion that as soon as it appeared that the jury had included in their verdict elements of damage not arising from the defendants' acts, those damages must be excessive, and the verdict should be set aside on that ground. I cannot myself conceive a more glaring substantial wrong or miscarriage of justice happening, in any case, than that a jury should be directed in any form of words to assess damages against a party in respect of a tort committed, not by himself, but by another for whom he is in no way responsible. For in the words of Lord Watson in *Bray* v. *Ford* (1): "Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal." I do not think a jury have any jurisdiction to award damages against a party litigant in respect of a tort which he is not proved to have committed, or for which he is not responsible; and I concur with Pickford L.J. in thinking that if in any case it be clearly shown that the jury have done so, their verdict should not be allowed to stand, whether the jury have so acted against the direction of the judge, or by his direction, or without any direction, because they have exercised a jurisdiction they do not possess, and which the judge cannot, by anything he may say, confer upon them.

If in a statement of claim a defendant be charged with having been guilty of two torts such as the publication of two separate libels, and by the evidence given he is proved guilty of one of those torts, but not proved guilty of or responsible for the other, then it is, in my view, his absolute

(1) [1896] A. C. 44, 48, 49.

legal right to have this second tort withdrawn altogether from the consideration of the jury. It is not properly before them for their decision. They have no jurisdiction whatever to award damages of any kind in respect of it either directly and expressly or indirectly by increasing because of it the damages they may award for another cause of action. Neither, in my view, can any omission by the defendant, if the judge should direct them to do so, to call his attention to his error, confer that jurisdiction upon the jury. It was, as I understood, suggested during the argument that the jury would probably have awarded damages to the same amount in respect of the tort of which the respondents were proved to have been guilty, even if the other tort had never been alluded to. That is, in my view, a dangerous and illegitimate speculation. Lord Halsbury deals with a similar suggestion professedly based upon Order XXXIX., r. 6, in *Bray* v. *Ford*. (1) He said: "It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would justify a verdict to the same amount of damages. I absolutely decline to speculate what might have been the result if the judge had rightly directed the jury. It is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant." In the present case an important and serious topic, which ought not to have been presented at all to the jury, was held to have been so presented, and if so, the wrong was all the greater. Lord Watson, in delivering a judgment in which Lord Macnaghten concurred, said: "In the one aspect, the appellant's letter conveyed a wholly baseless and libellous charge; in the other, a well-founded accusation, followed up by language which conveyed other and libellous imputations. I do not feel myself in a position to affirm that, in each of these cases, the same jury would have awarded the same sum of damages. I could not possibly arrive at that conclusion without first assessing the damages in each case for myself; and that is a duty which, in my opinion, I ought not to undertake in a case like the present.

(1) [1896] A. C. 44, 48, 49.

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In such a case the assessment of damages does not depend on any definite legal rule, and is the peculiar function of the jury, by whom the party liable is entitled to have the measure of his pecuniary liability determined. For these reasons I have come to the conclusion that there has been a substantial miscarriage within the meaning of Order XXXIX., r. 6, and that the case must be remitted for a new trial." Lord Herschell, after quoting this rule, said: "The Court of Appeal came to the conclusion that there had been no such wrong or miscarriage in the present case. They thought, as I understand, that the nature of the libel was such that the jury would have been entitled to give, and would probably have given, the same verdict, even if the direction of the learned judge had been the other way. If I had thought that the enactment relied on sanctioned dealing with the case in this way, I am far from saying that I should have differed from the conclusion at which they arrived. But I have come, with some reluctance, I own, to the conclusion that it does not." If the direction of the learned judge in this case be that which the Court of Appeal have unanimously held it to be, the principle of the decision in *Bray* v. *Ford* (1), I think, directly applies to it, and is binding on this House.

The damages awarded in the present case have been frequently styled in argument "excessive damages," and the application to set aside the verdict of the jury spoken of as an application to set it aside on that ground. In one sense, if the respondents' case be true, the damages are excessive, because something has been illegitimately added to them in excess of what might have been legitimately awarded. That, however, is not the sense in which the term is commonly used. The words "excessive damages" in their ordinary meaning apply to cases where a jury, having jurisdiction to award damages for a particular tort or breach of contract, award far too much. In such a case there is an abuse or misuse by them of their proper powers, but no usurpation of jurisdiction. In the present case, if the

(1) [1896] A. C. 44, 48, 50, 52.

conclusion of the Court of Appeal be right, the jury had no jurisdiction to do the thing they have done.

It was scarcely contended, it could not, I think, be successfully contended, that the language used by the learned judge did not amount to a misdirection touching the special damage proved to have resulted from the B. A. T. libels; but it seemed to me to be assumed that any misdirection which took place was confined to that matter, and that the burden of showing that it extended to general damages arising from the same libels rested upon the respondents. That, I think, is a quite unwarranted assumption. The general rule is that if there has been a misdirection it is for the party showing cause against the motion for a new trial on the ground of that misdirection to show that the alleged misdirection did not cause a miscarriage of justice, and he must show this by legal evidence: *Anthony* v. *Halstead* (1); *White* v. *Barnes*. (2) If, therefore, the misdirection applied to the special damage arising from the B. A. T.'s tort, the burden of showing it was clearly and plainly confined to that damage rests, I think, upon the appellants; and naturally so, for this reason, that the very existence of the right of a jury to return a verdict for the special damage proved to result from the publication of particular libels such as those published by the B. A. T. necessarily implies that they had a right to award general damages for the same libels. The jury in this case must have been aware that libels such as these import damage, that no evidence of special loss or damage need be given to entitle a jury to award general damages in respect of them. They had been practically told so by the learned judge, and they acted upon his direction in reference to the libels published by the respondents, as to which no evidence of special damage was given at all.

In *Johnston* v. *Great Western Ry. Co.* (3) Vaughan Williams L.J. said: "So in the present case, if I could come to the conclusion that, looking at the figures, the jury must have taken into account some head or some measure of damage

(1) (1877) 37 L. T. 433. (2) [1914] W. N. 74.
(3) [1904] 2 K. B. 250, 256, 261.

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not properly involved in or applied to the plaintiff's claim, I should say that we ought to order a new trial." Stirling L.J. seems to concur. It would appear to me that there could be no more flagrant instance of a jury's taking into account a head of damage not properly involved in the plaintiff's claim than where they take the damage resulting from A.'s tort to inflame the damage awarded against B. in respect of an independent tort committed by the latter. A.'s tort in the present case represents gross libels on the plaintiffs touching their solvency, printed and published, not by the defendants at all, but by the Bank, shortly designated in the present case by the letters B. A. T. These letters referred to three subjects: The Corocoro Company, the Banco Mercantil, and Valenzuela. At pp. 221, 222, 223 of the appendix evidence is given in detail of the different items of special damage resulting from these latter publications before a jury who, as I have shown, must have been well aware that, where they had power to award special damages for libel, they necessarily had power to award in addition general damages for the same libel. The contents of the letters were not laid before the jury solely for the purpose of recovering the special damage resulting from them. They were introduced, as Mr. Rigby Swift frankly admitted, because he hoped to prove that the respondents were responsible for their publication. He failed to do that; but had he succeeded the jury would have been as well entitled to award general damages in respect of them as they were in the case of the libels actually published by the respondents. As soon, however, as he had absolutely so failed, the contents of these letters became matters wholly foreign to the subject of the guilt or innocence of the respondents for the libels published by them, and for which alone they were responsible. From these matters the jury ought to have turned away their attention and no longer heeded them. The learned judge should, I think, have directed them in clear, distinct, and unambiguous language so to do. In my view he has, in a moment of forgetfulness, I think, and through a mistake quite pardonable,

not only entirely failed to do this, but, as I shall show presently, he has turned the jury's attention to these very letters in language which left them to deal at large with any damages, general or special, arising from them. If it were quite clear that the jury intended to give a verdict for 2540*l.* in respect of the libels for which the respondents were responsible, and only added the sum of 460*l.* due to publications for which they were not responsible, there might be some ground for letting the verdict, at the appellants' request, stand for the former sum. But this is, in my view, the very fact which there is nothing whatever to establish. On the contrary, I think, having regard to the direction given to the jury, the most natural and probable result was that if they meant by the sum of 3000*l.* to cover any damages caused by these extraneous matters they included both the general and special damages resulting from them, and not the latter alone. It is quite true that Sankey J. said he would tell the jury that the respondents were not responsible for the statements contained in the libellous letters of the B. A. T. Immediately after that remark, however, evidence was given as to the special damage caused by these very letters. Having dealt at p. 261 of the appendix with bill No. 1 for 1000*l.* drawn by Venn, Vargas, payable to B. A. T., and held by the defendants, which is the only bill of the appellants to which the libellous letters of the respondents refer, he proceeded at p. 266 to deal with seven other bills forming the subject-matter of the B. A. T. libels, and proceeds to say (in justice to the learned judge I give his actual words): "Now, gentlemen, I have nearly finished the facts of the case, but I must say a word or two about the other seven bills, because you know, as Mr. Rigby Swift pointed out to you in his opening remarks, there are eight bills which are made the subject of this inquiry, but he very frankly admitted that with regard to seven of them he was not in a position to give conclusive proof. I do not think that is a matter that you need trouble very much about. He claims to have discovered this morning, or rather last night, by a telegram of November 14, some evidence in the letter which was referred to in that telegram with regard to

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the second of the two bills; but if I might again advise you, it really does not make very much difference, because one libel of this sort is a serious thing, if it were a libel, and if the defendants are liable for it, and therefore, if I may advise you, I do not think I should pay very much attention to the other seven bills which are the subject-matter of this action."

Not trouble themselves very much about those libels for which the defendants in the action were not responsible! Not pay very much attention to the subject-matter of them! As I have already said, I think the jury should have been told that the libels of the B. A. T. were matters with which they had nothing whatever to do, that the persons responsible for their publication, who only could be mulcted in damages of any kind in respect of them, were not before them. The learned judge then said: "Now I turn to the damages." What damages? Surely the damages properly recoverable in the suit which alone it was the jury's right and privilege to measure and award. The sum of 460*l.* formed no portion of these. Yet, instead of turning away the minds of the jury from it, he directs their attention to it, and with what object and to what end, unless it be to lead them to believe that the tort from which the damage sprung was one for which the respondents were responsible? He said: "They have proved special damage about 460*l.* If you find they are entitled to damages—of course it is a serious thing to injure a man in his trade—Mr. Barber gave several instances. There was the instance of the cables, the Corocoro Company, the Banco Mercantil, and Valenzuela." Yes, but instances of what? Why, it appears to me these words clearly mean instances of injuries inflicted upon the appellants in their trade for which the respondents might, in that suit, be made to answer in damages. He then proceeded: "Those make the 460*l.*; and then he said, 'Well, it is a very unfortunate thing for me, because at this time there was a lot of new business to be got in South America, and I was not, so to speak, in on the ground floor. There was a lot to be done there, and just at the time I could have picked up a lot of things there came this unfortunate suspension of my credit, and people

got to know of it, and I have lost a lot of money and a lot of custom.' That is a matter entirely for you." I confess it appears to me, as it did to each of the Lords Justices in the Court of Appeal, that the jury were told in effect to take into consideration both special and general damages resulting from statements which were not made by the defendants, or for which they could be held responsible. The last five lines of the passage appear to me to be inexplicable on any other assumption. It has been urged that the judge's attention should have been called to the mistake he was making in thus directing the jury, when he would have probably corrected the error. No doubt it would have been much better had that been done; but the respondents cannot, I think, be held to be so bound by the course of the trial that they are precluded, by reason of this omission, from raising the point they now raise on the award of the damages. They ought not, I think, to be shut out from raising it in this House, and contending, as they have done, that the jury have been gravely misdirected and misled, and that it is impossible to say how much of the sum of 3000*l.* awarded was given to cover damages general and special arising from a tort for which the defendants in the suit were not responsible. Nothing has occurred in the conduct of the case to bind the respondents to submit, against their consent, to a verdict for 2540*l.*, which, in fact, the jury never found: *Watt* v. *Watt*. (1) I am accordingly of opinion that the order appealed from was wrong, and that a new trial should be directed.

LORD SHAW OF DUNFERMLINE. My Lords, the appellants and the respondents had numerous business relations with each other. A part of their arrangements was as follows. Goods bought and shipped to the appellants in South America were paid for by the negotiation of drafts drawn by the Banco Aleman Transatlantico. These drafts were forwarded by that bank to the respondents, their London agents, and the latter presented the drafts to the appellants, who accepted

(1) [1905] A. C. 115.

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them, and when they fell due paid the contents to the respondents. The course of business was entirely regular until the European war broke out. In October thereafter the respondents and appellants differed—the appellants wishing to have the transactions continue on both sides and to get their payments from, as well as to make their payments to, the respondents, and claiming that at least when the latter payments were made the securities in respondents' hands should be pro tanto released. The respondents declined both proposals. They were apparently determined to insist on the appellants making acceptances and payments, without the appellants receiving any counter-payments or any release of securities.

Among the bills drawn upon the appellants and held by the respondents was one by Venn, Vargas & Co. for 1000*l*. It fell due October 9, but by the moratorium that date was carried forward to November 9, 1914. On October 14 the respondents telegraphed to the Banco Aleman Transatlantico, Lima (Peru), as follows: "Number 19,317 unpaid, Deutsche Bank." The bill referred to was in fact a current bill. And the sending of that telegram was therefore an extraordinary, an indefensible and likely to prove a most damaging act. It produced instant commotion. A wire was sent by Mr. Venn to this country, and a meeting took place with Mr. Pannenborg, the respondents' manager, who disclaimed personal knowledge of the sending off of the offensive telegram, and promised to put the matter right.

My Lords, in my opinion, one course, and one only, was open to him in these circumstances, and that was to transmit instantly by telegram to the Banco Aleman Transatlantico a correction in these or similar terms—namely, "Telegram of 14th misunderstood. No. 19,317 still current." He did not do so. Although he had been by this time expressly informed of the fact, which indeed as a commercial man he must be taken to have known very well—namely, that his firm were the authors of a misleading and improper telegram plainly suggesting that a bill due by the appellants had been dishonoured and therefore seriously injurious to their reputation—he showed himself to be callous to and quite reckless of

the grave consequences to the appellants; and the firm then proceeded to take their second extraordinary step. A letter was on October 21 posted to the Banco Aleman Transatlantico saying: "Your unpaid remittance No. 19,317 on J. Lionel Barber & Co., London, as per our cable of October 14th. We have taken divers steps in order to obtain settlement, but so far our efforts have been without result. The matter still occupies our attention, and we hold the bill here at present." My Lords, I do not characterise this: it was, instead of being the promised retractation or rectification, simply an indefensible repetition of the libellous attack. I feel no surprise that a jury of the City of London found express malice, and assessed damages for the plaintiffs at the sum of 3000*l*. Another circumstance which may justly have weighed with them is that Mr. Pannenborg did not think it right to enter the witness box to give any explanation of his conduct. Further facts were elicited; but what has been stated is in my opinion perfectly sufficient to justify the verdict in its entirety.

The case was summed up to the jury by Sankey J. in a charge which showed the most scrupulous anxiety for complete fairness being done, with full avoidance of all prejudice against the respondents.

Unfortunately in his charge a slip was made. In an early portion of the charge the learned judge had properly instructed the jury that the plaintiffs had not been able to give conclusive proof on the subject of seven bills other than the one to which I have adverted, and that the jury need not be troubled about those. Whereas in the latter portion of the charge he stated that special damage amounting to 460*l*. had been proved, the fact being that that special damage was not connected with the single bill transaction which was the only remaining subject of the inquiry.

My Lords, I am clearly of opinion that this made no difference to the jury's mind, and that they dealt with the broad question of slander uninfluenced by this irrelevant matter, and upon that footing they assessed damages at 3000*l*. Upon this subject I am happy to be in entire concurrence with the Lord Chief Justice of England and Pickford L.J. in their opinion

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that the sum of 3000*l.* awarded on the single broad issue would not have warranted the conclusion that the verdict was either excessive, unreasonable or perverse. Personally, I go further, and say that in my view it would have been clearly a proper verdict.

The question accordingly is whether this proper verdict should not be allowed to stand, because in one part of the judge's charge an irrelevant element of special damage was stated to be before the jury. As I say, the jury may quite well have themselves discarded that element in view of the judge's earlier remarks. But there remains the possibility that they did not do so. The question is: Shall that possibility avoid the verdict and compel a fresh trial of the whole case?

In my opinion, my Lords, this is a question of circumstance and of degree. One circumstance which I own weighs very largely with me is this, that when the error was made in the judge's concluding sentences to the jury a single word of the counsel representing the respondents would have sufficed to correct the error. That word was not uttered. If it had been, the verdict, I feel almost certain, would have been for the same amount. In such a situation, a party so standing by may have the advantage of a right to subsequent challenge for misdirection, but it first lies upon him to show clearly that the element improperly submitted for consideration did in fact and according to the reasonable probabilities of the case inflate the verdict. I am clearly of opinion that this has not been shown. On the contrary, my view is that, had the special damage been there and then eliminated, the verdict would have been for the same sum—namely, 3000*l.* This is not a case in which a different verdict—namely for 3000*l.* less 460*l.*, that is to say, for 2540*l.*—is asked to be pronounced by the Court, as if that verdict had been pronounced by the jury. Had that been so the decision of *Watt* v. *Watt* (1) would probably have been in point. The parallel with *Watt* v. *Watt* (1) fails. The essential element is lacking—namely, that in *Watt's Case* (1) the verdict in the language of Lord Halsbury "cannot be allowed

(1) [1905] A. C. 115.

to stand because it is unreasonable and excessive," whereas the same cannot be affirmed in the present case.

My Lords, I am not prepared to say that the law as laid down by Tindal C.J. in *Moore* v. *Tuckwell* (1) has ever been overruled, or is not still sound. The learned judge thus expressed it: "It is not the practice, as stated at the Bar, that, in all cases where there has been a misdirection, a new trial must be granted de jure, because a bill of exceptions might have been tendered; for, where the Court can see clearly that real and substantial justice has been done, or may be done, without a new trial, the rule has been refused." Further, my Lords, and distinctly to the same effect is the rule of the Supreme Court, Order XXXIX., r. 6—namely, that "a new trial shall not be granted on the ground of misdirection . . . . unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby ocasioned." I am of opinion that this case is plainly one in which the rule can be applied properly and with salutary effect, and further, that the Court of Appeal should so have applied it.

In the result accordingly I should have been prepared to affirm the verdict as it stands. As, however, the appellants offered a deduction of 460*l.* I see no objection in respect of that offer to reducing the amount to 2540*l.* and permitting judgment to issue for that sum, the appellants to have the costs of the proceedings throughout.

LORD PHILLIMORE. My Lords, the two principal questions in this appeal, whether it was open to the jury to say that the language of the two alleged libels, or at any rate of one of them, was defamatory, and whether if so the communications being on privileged occasions there were materials from which the jury could infer express malice, are so closely intertwined, that I am somewhat surprised that different results in respect of them should have been arrived at in the Court of Appeal. It is to be remembered that if the statements were to any extent defamatory they are to that extent not justified, and that all the facts were in the knowledge of the employees of

(1) 1 C. B. 609.

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the bank and, therefore, that so far as the statements were calculated to convey what was untrue, they were untrue to the knowledge of those who made them.

It should be conceded that when the occasion is privileged we ought not to criticize too closely the expressions which one who has a duty to another uses in describing the actual conduct of a third. But the matter is so eminently one for a jury that it must be rarely that the Court can say, "True it is that the defamatory expressions are not correct, that they describe the conduct of the third person in blacker and stronger terms than those in which they should have been described, but still they were not so much blacker or stronger as to warrant the jury in concluding that the composer of the libel was actuated by malice, either because he had some ulterior purpose to serve, or because he was recklessly careless in making the communication."

Now that the words were capable of a defamatory meaning and that the answer of the jury that they were defamatory could not be interfered with was the unanimous view of the judges in the Court of Appeal, and none of your Lordships who have spoken have seen any reason, and I see no reason, to differ from that opinion.

The instructions which the B. A. T. put upon the green slip which they attached to all their bills and the telegram "No. 19,317 unpaid" sent without any qualification, might, it seems to me, well lead the South American recipient, particularly in the strain of all commercial credit which the outbreak of war had produced, to believe that the plaintiff company was unable to meet its obligations. So much for the first libel. As to the second, the matter is so plain that I do not think it worth discussing.

So much as to the first question put to the jury, and the answer which the jury returned. As to the question and answer as to express malice, the words were, it must be taken, defamatory. They were needlessly defamatory. The kernel or nucleus of truth contained in the communication could have been, by a little more care in the language of the telegram, possibly by the addition of two or three more words at no very

great cost, have been conveyed without danger of any improper inference. The second libel was in a letter, and it is idle to say that there was any difficulty, or that there would have been any extra expense, in stating the correct facts, and so guarding and limiting them as to prevent any improper inference. My Lords, I think that upon these materials alone the jury under a proper and careful direction, such as they received from the learned judge who tried the case, might find malice.

But the matter does not rest here. The conduct of those in charge of the defendant company after the publication of the two libels, and indeed before the publication of the second, was properly laid before the jury. The attempt by the telegram of October 22 to clear the mischief of the telegram of October 14, after the injury which it had done had been pointed out, was lame and late, and the mischief was repeated, and indeed increased, or, at any rate, the jury might well think so, by the telegram of November 12. For these reasons I agree with this part of the judgment of the Lord Chief Justice, and I disagree with the judgments of the Lords Justices who formed the majority of the Court of Appeal, and I do not think that judgment should have been entered for the defendant company.

There remains a third question, which is the only one which has given any trouble to your Lordships' House, and as to which there is a difference of opinion among your Lordships, whether there ought to be a new trial by reason of the jury having been wrongly directed by the learned judge as to the subjects in respect of which they might award damages?

There is, I think, now no doubt—indeed it was, as I thought, admitted, and rightly admitted, by counsel for the plaintiff company—that the learned judge told the jury by some mistake, such as might not unnaturally be fallen into at the conclusion of a long and complicated trial, that in addition to general damages they might give special damages up to the sum of 460*l.* by reason of the injury which the plaintiff company had suffered from the action of three firms in South America.

The plaintiff company when it launched its suit complained not only of the two libels in respect of Bill No. 19,317, but also

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of libels in respect of seven other bills, as to which it alleged that the defendant bank had on November 19 cabled to the B. A. T. the words "Draft unpaid." It was not surprising that the plaintiff company made this complaint because the B. A. T. did on November 19 and subsequent days write to the three South American firms that they had received a cable from the defendant bank to that effect. But when the case came to be thrashed out at the trial it turned out that this was a mare's nest. The B. A. T. had received no such cable; why it wrote as it did was not ascertained and is not material. The B. A. T. may have drawn the inference that the bills of the three South American firms had not been honoured from the information which it had received as to Bill No. 19,317 which had been drawn by a fourth South American firm; but if the B. A. T. drew this inference it was a wholly unwarranted one, as indeed counsel admitted. It may have been a mere blunder on the part of those in charge of the B. A. T. It might possibly be, seeing that the B. A. T. was in German hands, an act of pure mischief done in order to damage English credit. At any rate, by the end of the case there was no proof that any such cable as that which the plaintiff company charged to have been dispatched on, or about, November 19 had been sent, and the case made as to a libel in respect of the other seven bills broke down. But the advisers of the plaintiff company having these letters of the B. A. T. under their eyes naturally persisted in the belief to the last moment that there was such a cable, and that before the trial was over they would get proof of it. They thought that if the defendant bank called witnesses they would be able to extract some admission from them, and they therefore produced evidence to show the special damage which they had incurred by reason of the communications made by the B. A. T. to the three South American firms, which damage could be traced back to the defendant bank if it had sent the alleged cable on November 19, but could not otherwise be laid to the charge of the defendant bank. As they could not prove this cable these items of special damage disappeared. But unfortunately Sankey J. told the jury that they had proved special damage, about 460*l.* It is

conceded that this was wrong, and that the matter must be put right either by reducing the verdict for 3000*l.* by the sum of 460*l.* or by ordering a new trial. I have said, reducing the verdict by 460*l.*, because though the jury may not have built up the sum of 3000*l.* by adding 460*l.*, or even a part of it, to the general damage, it is quite possible that it may have done so, and we have nothing to guide us. Counsel for the plaintiffs' firm felt this, and stated to your Lordships' House that he was willing, if he could hold his verdict for the balance, to have the sum of 3000*l.* reduced by 460*l.*

To this suggestion two answers were made by counsel for the defendant bank. One, which I will take first, is founded upon the decision of this House in the case of *Watt* v. *Watt*. (1) That decision, which I may perhaps be allowed to say is one of inconvenient rigour, is nevertheless one which is unimpeachable, being founded on logic and binding by way of authority. The principle of it as I understand is this: Where damages are at large and the Court of Appeal is of opinion that the sum awarded is so unreasonable as to show that the jury has not approached the subject in a proper judicial temper, has admitted considerations which it ought not to have admitted, or rejected or neglected considerations which it ought to have applied, it is the right of the party aggrieved to have a new trial. He is not to be put off by the Court saying that it will form its opinion as to the proper sum to be awarded, and reduce or enlarge the damages accordingly. He is entitled to an assessment by a jury which acts properly. He is not to be put off by a composite decision, or I might describe it as a resultant of two imperfect forces—an assessment partly made by a jury which has acted improperly and partly by a tribunal which has no power to assess.

This principle does not apply where the assessment of any head of damage is to remain untouched, and the only interference with the verdict is the elimination of a head of damage. Therefore, my Lords, if your Lordships should be of opinion that the whole extent of the mischief that can have been done by the unfortunate slip of

(1) [1905] A. C. 115.

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Sankey J. will be remedied by the reduction of this verdict to the sum of 2540*l.*, I see no difficulty in the way of your Lordships doing it, and I urge that it should be done.

But I confess that I think that the mischief is more deeply seated, and cannot be eradicated by such a superficial operation. I think that the judges in the Court of Appeal, who were on this head unanimous, were right in saying that there must be a new trial. I fear that the jury may have thought that the three items of special damage flowed from the libels uttered in respect of Bill No. 19,317, and that if you started by such a plain and easily ascertained direct and immediate damage as 460*l.* there was no limit to the expanding rings of commotion that a stone which had made such a splash as this first incident may have created.

For these reasons and for those also which have been given by my noble and learned friend Lord Atkinson, I must give it as my opinion that there ought to be a new trial.

Order of the Court of Appeal complained of in the original and cross-appeals reversed, and judgment of Sankey J. restored, subject to a reduction in the amount of damages awarded by 460l. as agreed to by the appellants; and the cross-appeal dismissed. The Deutsche Bank (Berlin) London Agency to pay the costs in the courts below, and also the costs of the original and cross-appeals to this House.

Lords' Journals, December 2, 1918.

Solicitors for the appellants: *Rawle, Johnstone & Co., for Laces & Co., Liverpool.*

Solicitors for the respondents: *Rehder & Higgs.*

[HOUSE OF LORDS.]

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1918
Dec. 17.

BRODIE . . . . . APPELLANT;

AND

CORPORATION OF CARDIFF . . . . RESPONDENTS.

Building Contract—Construction of Reservoir—Extras—Written Order of Engineer—Condition Precedent—Disputes as to Extras arising under Contract—Reference to Arbitration—Power of Arbitrator to dispense with written Order.

A contractor agreed to construct a reservoir for a municipal corporation at a fixed price in accordance with the specification. The work had to be done to the satisfaction of the corporation's engineer, with such additions, alterations, and variations as might from time to time be directed by the corporation or the engineer as provided by the specification. The specification provided that the corporation were not to become liable for the payment of any charge for additions, alterations, or deviations unless instructions for them were given in writing by the engineer. It also provided that in case any dispute should arise, either during the progress of the works or after the determination of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder, or as to any objection by the contractor to any certificate, finding, decision, requisition, or opinion of the engineer, such dispute was to be referred to the arbitration and final decision of a single arbitrator, and either party might demand an immediate determination of the dispute.

Disputes arose during the progress of the works as to requirements by the engineer for executing certain portions of the work in a particular manner and with certain materials. The contractor contended that these requirements were extras, for which he was entitled to be paid in addition to the contract price. The engineer refused to give written orders for these items on the ground that they were in accordance with the contract. The contractor carried out the work as ordered. On the completion of the contract the matter was referred to arbitration. The arbitrator found that the requirements were not in accordance with the contract, that the engineer improperly refused to give orders in writing for the same as extras, and that in deciding against the claim of the contractor the engineer did not act fairly or impartially, but had no dishonest motive; and he awarded certain sums to be paid to the contractor in respect of these items:—

Held, by Lord Finlay L.C., Lord Atkinson, Lord Shaw of Dunfermline, and Lord Wrenbury (Lord Sumner dissenting), that upon these findings the arbitrator had power to award that the items in question should be paid for as extras, notwithstanding the absence of any orders in writing by the engineer.

* *Present:* LORD FINLAY L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD WRENBURY.

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Per Lord Shaw of Dunfermline: Wherever a dispute is remitted to arbitration on admitted fact, it must be assumed that the fact admitted was not conclusive of the point to be determined, and that the arbitrator is free to make an effective award upon one view in one direction and upon another view in another direction.

Decision of the Court of Appeal [1918] 2 K. B. 146 reversed.

APPEAL from a decision of the Court of Appeal *sub nom. In re Nott and Corporation of Cardiff* [1918] 2 K. B. 146, reversing a decision of Bray J. upon an award of an arbitrator stated in the form of a special case.

By a contract under seal dated November 28, 1910, Louis Philip Nott, whose legal personal representative was the appellant, agreed to construct, under the directions and to the satisfaction of the engineer of the respondents, the Corporation of Cardiff, an impounding reservoir in the Taff Fawr Valley, in the county of Brecknock, according to, and in full and strict conformity and compliance with, the contract, for a lump sum of 201,077*l.* 7*s.* 4*d.*

The question raised by the appeal was whether it was competent for the arbitrator to award any sum to be paid by the corporation to the contractor for extra work done and material supplied by him in the construction of the reservoir, notwithstanding that such extra work and material were not ordered in writing and claimed for in writing as expressly stipulated in the contract.

The terms of the contract and the facts which gave rise to the dispute are fully stated in the report of the case before the Court of Appeal and in the judgment of the Lord Chancellor.

Bray J. held that the award was within the powers of the arbitrator. The Court of Appeal by a majority (Pickford L.J. and Neville J., Bankes L.J. dissenting) reversed this decision, and held that the arbitrator had no power to award any sum to be paid by the corporation on any of the claims submitted by the contractor.

A further question arose before the arbitrator as to the liability of the corporation to repay to the contractor certain rates paid by him as the occupier of a railway which by the contract he was bound to take over. The Court of Appeal (reversing the decision of Bray J., who affirmed the award

of the arbitrator on this point) decided against the claim of the contractor for repayment, and from that decision there was no appeal.

Nov. 22, 25, 26, 28, 1918.

Upjohn K.C. (with him *Szlumper*) for the appellant.

Upon the true construction of the contract the arbitrator had jurisdiction to award that the contractor should be paid the money value of the work and materials ordered by the engineer. The award takes the place of the written order of the engineer. Upon the findings in the award the corporation cannot be heard to set up the want of written orders in respect of any of the items allowed by the arbitrator. The items in question were outside the contract, and were substitutions or deviations, for which the contractor was entitled to be paid. The order in writing required by clause 5 has no application to a case where the engineer does not treat the work as outside the contract. Either the orders of the engineer were variations, for which the corporation must pay, or they were a breach of contract, in respect of which the contractor is entitled to damages. The engineer, in exercising his discretion, was bound to act judicially and he took an erroneous view of his duty—namely, that he was always to do what was best for his employers. [He cited *The Moorcock.* (1)]

Sir John Simon K.C. (with him *Holman Gregory K.C.* and *Bruce Thomas*) for the respondents.

Tamplin Steamship Co. v. *Anglo-Mexican Petroleum Products Co.* (2) shows that no term will be implied which is inconsistent with the express provisions of the contract. In this contract the corporation have made precise stipulations as to the terms on which they shall be liable, both positively and negatively, and there is no authority to make them liable except on those terms: *Thames Iron Works and Ship Building Co.* v. *Royal Mail Steam Packet Co.* (3) The arbitration clause contains nothing which gives any authority to dispense with the

(1) (1889) 14 P. D. 64, 68. (2) [1916] 2 A. C. 397 422.
(3) (1862) 13 C. B. (N. S.) 358, 378

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contractual rights of the corporation—i.e., with the written order of the engineer—or which throws upon the corporation any greater burden than the contract throws upon them. Nothing which has passed between the engineer and the contractor can alter the position of the corporation. The contract debars the contractor from making these extra claims except under an order in writing, and there has been no waiver of that stipulation. By postponing the arbitration until the work is done the result automatically follows that there is not a written order. At that stage it is a futility to demand payment for extras, because the correctness or otherwise of the opinion of the engineer goes for nothing, inasmuch as there has been no order in writing. Clause 5 contains a complete code of the conditions under which additions and variations can lead to extra payment, and those conditions are not satisfied. There is no power in the arbitrator to disregard the contractual conditions or to deprive the corporation of the option which the contract gives them of avoiding extra payment except under a written order. If instructions are given, which the contractor asserts, and the engineer denies, should be the subject of an additional charge, the only remedy of the contractor is to decline to do the work without a written order. The postponement of the arbitrator's decision on the contractor's claims, whether that postponement is the result of an arrangement with the engineer or otherwise, does not enlarge the power of the arbitrator or increase the liability of the corporation. It is said that the findings of the arbitrator and his award give rise to a situation which entitles the contractor to succeed in this appeal in spite of the terms of the contract. But the engineer did not act on the instigation of the corporation, nor, so far as the evidence goes, with their knowledge, his motive was not dishonest, and, if he took a wrong view of his duty, so that instructions which would properly have been given in writing were not so given, no fraud is proved against him—still less against the corporation, who knew nothing about the matter. In any event the corporation are not debarred from relying upon the conditions precedent stipulated in the contract

unless they have done something which prevents the performance of those conditions. There is here no question of standing by such as existed in *Hill* v. *South Staffordshire Ry. Co.* (1) The written order of the engineer is the condition precedent upon which everything turns, and the absence of the written order does not depend upon anything which the contractor was persuaded to do or not to do. The condition of no further liability except under a written order is written all over the contract, and the contractor must be assumed to have taken that term into consideration in stating a price.

Upjohn K.C. in reply.

Under this contract the engineer, acting as the agent of the corporation, had power to tell the contractor to go on pending the arbitration. If the corporation had declined an immediate arbitration, and the arbitrator upheld that view, then, under the terms of this contract, if the contractor had brought on his own material the engineer, on behalf of the corporation, could have ordered its removal, and deducted the expense from the contract price. The engineer is made by the contract the directing agent of the corporation, and is given complete control over the progress of the works. So far from the corporation being entirely freed from or unembarrassed by the postponement of the arbitration, that was a matter decided by the engineer, whom they had put in their place, and they were obviously bound by his acts. It is said that the effect of postponing the arbitration is that the arbitrator has really decided against the contractor, but it would require a very plain contract to produce that result.

As regards the power of the arbitrator, he cited *In re Hohenzollern Actien Gesellschaft für Locomotivbau and City of London Contract Corporation* (2); and as regards the contractor's right to relief in spite of the contract, *M'Intosh* v. *Great Western Ry. Co.* (3) and *Pawley* v. *Turnbull.* (4)

Holman Gregory K.C. replied as to the additional cases.

The House took time for consideration.

(1) (1865) 12 L. T. 63, 65.
(2) (1886) 2 Hudson's Building Contracts, 4th ed., 100, 109.
(3) (1850) 2 Mac & G. 74, 94.
(4) (1861) 3 Ciff. 70.

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Dec. 17. LORD FINLAY L.C. My Lords, the appellant in this case is the executor of Louis Philip Nott, a contractor who entered into a contract with the respondents—the Corporation of Cardiff—for the construction of a reservoir. The claim is for payment for extras. It was referred to arbitration, and the arbitrator has made an award in favour of the claim, subject to the opinion of the Court. The case was first heard by Bray J., who decided against the corporation, but on appeal this judgment was reversed by a majority of the Court of Appeal (Pickford L.J. and Neville J., Bankes L.J. dissenting). The substantial question is whether the claim for payment is barred by the want of a certificate in writing.

The contract is dated November 28, 1910, and is for the construction of an impounding reservoir in the Taff Fawr Valley. The contractor undertook to complete the works in accordance with the contract, specification, and directions, and with such explanatory instructions as might be given by the engineer, and with and subject to such conditions, alterations, and variations as might from time to time be directed by the corporation or the engineer as provided in the contract, specification, and conditions. The contract price was to be 201,077*l.* 7*s.* 4*d.*, to be paid against the engineer's certificates after adding or deducting such sums as should be determined by the engineer to be reasonable in respect of any alterations, omissions, additions, or variations in the works. There was prefixed to the specification a special notice, which must be treated as incorporated with it. The third paragraph of this notice was as follows: "3.—It must be distinctly understood that the whole of the conditions of the specification are intended to be strictly enforced, and that no extra charges in respect of extra work or works will be allowed unless they are clearly outside the spirit and meaning of the specification, nor unless such works shall have been ordered in writing by the engineer. All such claims shall be made when the monthly measurements are taken, and clearly and accurately set out in such manner as shall be prescribed. Any instructions given verbally are

to be deemed as instructions for the proper execution of the works, not involving extra charges." The fifth paragraph of the special notice provided for a statement to be signed monthly by the contractor that due regard had been given to all extras. The fifth clause of the specification was, so far as material, as follows: "5.—The engineer shall have full power and authority from time to time and at all times, by himself and the resident engineer, clerk of the works, assistant, or inspector for the time being, to make and issue such further drawings, and to give such further instructions as may appear to him or them necessary or proper for the guidance of the contractor, and the good and sufficient execution of the works, according to the true intent and meaning thereof, and as fully and effectually as though they had accompanied or had been mentioned or referred to in this specification; and the engineer may also alter or vary the levels or positions of any of the works contemplated by this specification or the contract, or order any further and other works not contemplated by this specification or the contract, or order any of the works contemplated thereby to be omitted with or without the substitution of any other works in lieu thereof, or may order any work or any portion of work executed or partially executed to be removed, changed or altered, and if needful that other works shall be substituted instead thereof; and for the purpose of preventing doubts, disputes, and litigation, it is to be distinctly understood that the corporation shall not become liable to the payment of any charge in respect of any such additions, alterations, or deviations unless the instruction for the performance of the same shall have been given in writing by the engineer," with other ancillary provisions for the protection of the corporation. Clause 13 provided, inter alia, that: "No claim or demand shall be made, set up, or preferred against the corporation by reason of any alleged or supposed variations or additions, or otherwise howsoever, unless the same shall have been ordered and claimed in manner herein directed, and shall also in the opinion of the engineer be 'other than original contract work' as intended by this specification."

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Particulars were given in the specification as to materials and workmanship in clauses 17 to 27. By the twenty-seventh clause it was provided that the clay puddle should be formed of good, tough, tenacious, blue clay, and at the end of the clause it was stated that clay suitable for the work could be obtained in sufficient quantity from the Cyfarthfa property on the western side of the valley, but the contractor was warned that he must satisfy himself on all points and that he is "required to bind himself to obtain all the clay that will be required of quality equal in every respect to the samples marked clay for puddle wall in the engineer's office, either from the above land or elsewhere." By the eighty-first clause of the specification, under the heading "General Conditions," the contractor was bound to perform the contract according to the specification and drawings referred to therein, and the further drawings, instructions, and directions which he might receive from the engineer, resident engineer, assistant, or inspector, who had power to inspect and reject anything defective or unfit or not in accordance with the specification and instructions, any dispute between the contractor and the resident engineer or assistant to be determined by the engineer. The works were to be finished by December 31, 1916, subject to a provision for extension (clauses 113 and 114). Clause 118 and the following clause empowered the corporation in case of default by the contractor to determine the contract and to have the works completed by others. Clause 124 contained provision as to payment upon certificates and claims.

Clause 128 is of great importance, and the decision of the case must largely turn upon it. It contains two paragraphs, but the first may for the present purpose be disregarded as the 22nd clause of the contract provided that the second paragraph was to override the first. The second paragraph runs as follows: "In case any dispute or difference shall arise between the corporation, or the engineer on their behalf, and the contractor, either during the progress of the works or after the determination, abandonment, or breach of the contract, as to the construction of the contract, or as to any

matter or thing arising thereunder (except as to the giving or withholding of any consent under clause 88, or as to any matter arising under clauses 9, 85, 89, 91, 94, 103, 116 and 126, all which excepted matters shall be in the absolute and final discretion of the engineer), or as to any objection by the contractor to any certificate, finding, decision, requisition, or opinion of the engineer (except as aforesaid) then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be referred to the arbitration and final decision of a single arbitrator, to be agreed upon by the corporation and the contractor. If either party desire to have such dispute or difference determined forthwith, such party shall give written notice to that effect to the other party, and the arbitrator shall, with the consent in writing of the other party, proceed with the arbitration. In the event of the other party failing within seven days of such notice, to give to the first-named party an assent in writing to the immediate determination of such dispute or difference, the arbitrator shall, after written notice to the non-assenting party of a time and place of hearing, decide whether such dispute or difference shall be immediately determined, or whether such determination shall await the completion or alleged completion of the work, and the same shall be determined at such time or times as the arbitrator shall decide. If in any such reference the arbitrator shall be of opinion that the contractor has been unreasonable or vexatious, or dilatory, either in evoking or in insisting upon reference, or in the mode of his conduct, or that injury from delay or otherwise has been occasioned thereby to the corporation, he may by his award indemnify the corporation in respect of such injury. This submission shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1889, and any amendment thereof."

Disputes arose early in the course of the works between the contractor and the engineer. The engineer gave various orders which the contractor claimed should be treated as extras, while the engineer insisted that they were covered by the contract price; but the works proceeded and the arbitration was held

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on completion. By submission dated June 17, 1915, the contractor and the corporation appointed Mr. Sandeman as arbitrator. He heard evidence and made his award dated June 6, 1916. The award was stated in the form of a special case, and by it, subject to the opinion of the Court, he awarded that the corporation should pay to the contractor in respect of the several claims enumerated by him a sum amounting to 11,933*l.* (eliminating Claim No. 1 as to rates, which has been abandoned). The award states that disputes had existed from an early stage of the works arising upon the objection made by the contractor to the findings, decisions, requisitions, and opinions of the engineer as to the works and materials. Clauses 5 and 6 of the award run as follows: " 5.—I find in respect of the performance of the contract generally as follows: (A) The resident engineer with the concurrence of the engineer improperly requested the contractor not to make claims for extra work under the provisions of clause 3 of the special notice on page 1 of the specification, and the engineer did not call upon the contractor to sign a statement under the provisions of clause 5 of the special notice on page 2 of the specification in order that the engineer might defer raising the question of extras with the employers to 'a more opportune time' and for the reasons aforesaid a certificate of the correct amount of the contractor's claims under the provisions of clause 124 of the specification was not required or given. (B) I was not informed whether 'the more opportune time' in the last sub-paragraph mentioned had arrived, but at the hearing before me it was not disputed by the employers that the contract sum had been exceeded by about 13,000*l.*, and that in respect of that excess no extra orders had been given. (C) The engineer was and is the permanent waterworks engineer of the corporation, and has been in their employ in that capacity for about 20 years. The works the subject of the contract were the first works of any magnitude which he had carried out entirely by contract, and in performing the duties required of him by the terms of the contract, he failed to realise, or overlooked the fact, that in so far as such duties consisted of the exercise by him of a discretion or

decision which was expressed by the contract to be final or were judicial or quasi-judicial he was under an obligation to act fairly and impartially and independently of any duties which he might otherwise owe to the employers as their salaried official. 6.—I find in particular in respect of the claims hereinafter mentioned and numbered 2, 3, 4, 5, 7, 11, 13 and 17 in respect of which I have, as hereinafter appears, awarded more or less in favour of the contractor, generally as follows :—(A) The engineer required the contractor, without extra payment, to execute work and supply materials in excess of the work and materials which the contractor had undertaken to execute and supply under the contract and refused to allow the contractor to use materials in the execution of the works which were in accordance with the contract. (B) The engineer permitted his subordinates, the resident engineer and inspectors, almost continuously throughout the execution of the works—(i.) To make excessive and unreasonable demands upon the contractor as to the methods by which the works and operations were to be carried out beyond the methods contemplated by the contract and to insist upon compliance with such demands; (ii.) to demand of the contractor a degree of precision in the execution of the works which was unusual, unnecessary, and unreasonable, and not contemplated by the contract and to insist on compliance with such demand; and (iii.) to refuse to allow the contractor to use materials in the execution of the works which were in accordance with the contract. (C) The contractor objected to such requirements refusals and demands in paragraphs 6 (A) and (B) mentioned and disputes thereupon arose which, as regards the disputes giving rise to claims numbered 2, 3, 4, 5, 7 and 11, were from time to time submitted by the contractor to the engineer for his decision, the engineer gave decisions against the contractor in respect of the said disputes giving rise to such claims, and the contractor disputed such decisions of which the engineer had notice, and, as regards the disputes giving rise to claim numbered 17, such disputes and the causes thereof were, notwithstanding the objections made to the engineer by the contractor, permitted by the

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engineer to continue and accumulate during the execution of the works, the engineer had ample but not formal notice of such disputes, and as regards the disputes giving rise to claim numbered 13 the contractor protested to the resident engineer against his requirements and he refused to alter the same. (D) The engineer in making such requirements in excess of the work and materials which the contractor had undertaken to execute and supply under the contract, in refusing to allow the contractor to use materials which were in accordance with the contract, and in permitting the resident engineer and inspectors to make and insist upon the compliance with the unusual unnecessary excessive and unreasonable demands in paragraph 6 (B) mentioned and to refuse to allow the contractor to use materials which were in accordance with the contract, and in deciding against the contractor in respect of such matters as he did decide, did not (without any dishonest motive) act fairly or impartially. (E) In so far as such requirements, refusals and demands would or did result in an addition to or an alteration or deviation of the works contemplated by the contract, the engineer did not give instructions in writing within the provisions of clause 5 of the specification, and improperly withheld such instructions. (F) The said requirements, refusals, and demands in paragraphs 6 (A) and (B) mentioned delayed the carrying out of the works, and in consequence of such requirements refusals and demands and of such delay the contractor was put to additional expense beyond the expense to which he would have been put in carrying out the works in accordance with the contract." Clause 7 contains findings as regards the claims. As regards the claim in respect of the clay, the arbitrator finds as follows: "(iii) The Neath clay which the contractor proposed to use was good, tough, tenacious, blue clay, of quality equal in every respect to the sample marked 'clay for Puddle Wall' in the engineer's office and was in accordance with the contract. In consequence of the said refusal of the engineer the contractor was compelled to procure clay from Cyfarthfa at an additional expense."

As regards claim No. 17, which was for extra expenses caused

by undue interference with the works, the arbitrator finds as follows: "(i.) The supervision was not in accordance with any provision of the contract or of the specification in that the resident engineer and inspectors were permitted by the engineer to make and continue to make unusual unnecessary excessive and unreasonable demands upon the contractor as before referred to in paragraph 6 (B) and to insist upon compliance therewith, notwithstanding the objections of the contractor. (ii.) The contractor or his agent from an early date in the execution of the works made objections to the engineer as to the said demands of the resident engineer and inspectors (of whom there were seven or eight) and disputed the same and from time to time renewed such objections. (iii.) The engineer nevertheless (but with some modification) permitted the resident engineer and inspectors to continue such demands although the contractor informed him on more than one occasion that he would at the settlement of accounts have to put forward claims for the extra cost he was being put to in the execution of the work in consequence thereof. (iv.) The contractor sufficiently complied with the provisions of clause 81 of the specification. (v.) The contractor was, in consequence of the said demands and of the delay occasioned thereby, caused additional expense in the execution of the works. (vi.) The engineer did not extend the time under the provisions of clause 114 in respect of the delay in the preceding paragraph mentioned, and (subject to the opinion of the Court) I find that he had and has no power to do so at all and more particularly having regard to his acts and conduct (hereinbefore referred to in paragraphs 5 and 6)." In the tenth and eleventh clauses of the award the arbitrator stated that he did not give effect to the contentions of the Corporation, but that if the Court should be of opinion that effect ought to have been given to them or any of them, then he awarded in accordance with the opinion of the Court, and directed payment to be made accordingly.

Although the documents are voluminous, the question in dispute may be stated in very simple terms. During the

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progress of the works the engineer made a number of requisitions upon the contractor as to the work to be executed and the materials to be used, and insisted that these requisitions were covered by the terms of the contract, and were for matters included in the contract price. The contractor insisted that they should be treated as extras. Under these circumstances a matter had arisen which by condition 128 was to be referred to arbitration. The effect of clause 128 with regard to a dispute as to the refusal of the engineer to give an order in writing for any item as an extra is, in my opinion, this. The clause provides for any dispute on such a point being arbitrated at once if it is decided on a preliminary arbitration that it ought so to be decided at once. If the arbitration is forthwith held, it appears to me that the award by the arbitrator that the item in dispute is an extra, and therefore ought to have been ordered in writing, takes the place of the order in writing. The arbitration is an appeal from the refusal by the engineer to give such an order, and the meaning of the provision is that in that case the contractor may go on with the work, relying on the interim award as putting him in the same position as if the engineer had given an order in writing. On the other hand, on the preliminary arbitration it may be determined that the decision shall await the completion of the work. What the contract contemplates is an order in writing before any extra work is done; and if the arbitration stands over either as the result of a preliminary arbitration or by consent till the completion of the works, it seems to me that the meaning of clause 128 is that the award then to be made, if in favour of the contractor, shall have the same effect as if an order in writing had been given. This is indeed an a fortiori case as compared with the case of arbitration before the work had been done.

It is obvious that if an immediate arbitration had been held with regard to each of the many matters in dispute the progress of the works might have been most seriously interfered with. I think the effect of the findings of the arbitrator is that by arrangement between the engineer and the contractor the arbitration stood over till the works should

be completed. This was a reasonable course to take, and was in the interests of both parties and, in my opinion, it is clear that the engineer in consenting to this arrangement was acting on behalf of the corporation and within the limits of his authority. The engineer filled a double capacity. Where he had to arbitrate he was bound to act impartially and not merely as a servant of the corporation, but in other matters relating to the contract he was the representative of the corporation, and had authority to make, on their behalf, arrangements as to the completion of the work, so long as these arrangements were not inconsistent with the terms of the contract. When the arbitration was held it appeared that the engineer was in the wrong, and the award finds that the claims ought to have been allowed as extras. On the arrangement for arbitration at the end the contractor executed these extra works, and it is now strenuously contended on behalf of the corporation that although the award is in favour of the contractor, and shows that an order in writing should have been given, the corporation are entitled to defeat the contractor by pleading that there is no order in writing. In my opinion this contention is unfounded. The dispute was whether the item was an extra for which an order in writing should be given, and when the parties agreed that the work should be done and that the question should stand over for arbitration, the effect of the contract is that the finding of the arbitrator is to take the place of the order in writing which ought to have been given. Otherwise, the postponed arbitration would be entirely useless. The corporation particularly relied upon the last sentence in paragraph (c) of the special notice prefixed to the specification that any instructions given verbally were to be deemed as instructions for the proper execution of the works not involving extra charges. This appears to me to have no bearing on the question whether the findings of the arbitrator were to supply the want of a written order. The dispute that arose was whether the engineer was entitled to give merely verbal orders in respect of these items. It is an appeal from the decision of the engineer, and if the contractor succeeds he

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must be in the same position as if the engineer had given the order.

There was a good deal of discussion as to the fourth clause of the specification. I have not set it out as, in my opinion, it does not, on its true construction, in any way qualify the application of the provisions of the next succeeding clause (clause 5) as to additions. Clause 5 begins by empowering the engineer to give all directions necessary for the carrying out of the works covered by the contract, which in their nature of course could not be extras. It goes on to empower the engineer to order alterations, additions, and omissions with or without substitutions, and provides that the corporation are not bound to pay for any additions, alterations, or deviations unless they have been ordered in writing by the engineer as an extra, and with a description of the work, and contains some further provisions for the protection of the corporation in respect of such items. These provisions must apply to all additions, and they would be fatal to the contractor's claim but for the provisions of the contract for appeal to arbitration against the decision of the engineer to refuse an order in writing. The same observations apply to the concluding sentences of clause 12 of the specification. There was some discussion as to the effect of clause 26 of the specification upon the order of the engineer that Cyfarthfa clay should be employed. Upon the findings of the arbitrator it is clear that this was an extra, as it was more expensive than Neath clay, which the arbitrator found was in conformity with the contract. Clause 126 of the specification makes every decision of the engineer, with certain exceptions which for the present purpose are immaterial, subject to arbitration, and I have already adverted to the effect of the provisions of clause 128.

The findings in clause 5 of the award seem to me to be consistent only with the conclusion that the question which was to stand over for decision was whether the work was an extra, and I cannot accept the argument on behalf of the corporation that the matter was to stand over in order that the corporation might deal with the contractor's claim merely

as a matter of grace. So to hold would be to find that the contractor abandoned the protection which the arbitration clause gave him, and executed the work, abandoning all legal right to payment. There is a specific finding in paragraph 6 of the award that the instructions in writing were improperly withheld by the engineer. According to the argument for the corporation, this finding on the capital point in controversy throughout would be entirely inoperative. The findings in paragraph 7 (h) (iii.) of the award seem to me further to confirm the view that both parties meant the arbitration to be a real arbitration dealing effectively with the matter of substance on which the parties were at issue. I think that on the findings in the award it must be taken that the engineer, on behalf of the corporation, was dealing honestly by the contractor with regard to the postponement of the arbitration. He was an agent of the corporation with regard to these works, and in making the arrangement for an effective arbitration on the completion of the works he was, in my opinion, acting reasonably in the interests of the corporation and within the limits of his authority from them.

In my opinion the judgment of the majority of the Court of Appeal should be set aside, and the order of Bray J. restored with costs here and below.

LORD ATKINSON. My Lords, I concur as to the result the Lord Chancellor has arrived at. The facts of this case have been already fully stated. It is unnecessary to repeat them. The main question for decision on this appeal is whether the arbitrator appointed under the provisions of the 128th clause of the specification, which forms part of the contract dated November 28, 1910, entered into between Louis Philip Noll deceased and the respondents for the construction of the Llyurgon Reservoir, had power to award payment to the former for the execution of extra works, in the absence of written orders for their execution given by the engineer of the respondents. The specification by its 15th clause appears to have embodied a notice placed at its head, the contents of which have already been quoted.

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By the first clause of the contract "works" are defined to include "all the works, matters, materials and things hereby agreed to be done and supplied respectively by the contractor." This clause, like many others of the contract documents, is not without its ambiguities. For instance, do the words "made or permitted" imply that an alteration, addition, substitution or deviation may be made and payment claimed for it, though no permission to make it had been previously given by the engineer? Or again, do the words "by and according to the judgment of and the admeasurements and the valuations to be made by the engineer" confer upon him the power to determine whether the alleged addition, etc., is in truth and in fact what it is alleged to be, as well as to fix its value? It is obvious that additions, alterations, substitutions and deviations may each and all be extra works. The liability of the respondents is no doubt, by clause 15 of the contract, confined to the sum of 201,077*l.* 7*s.* 4*d.* plus or minus such reasonable sum (if any) as the engineer may determine should be added to it, or deducted from it, in respect of any alterations, omissions, additions or variations in the works. By the 5th clause of the specification power and authority are conferred upon the engineer, first to direct and secure the good execution of the works contracted to be done for this sum, and second, to direct and secure that additions to, alterations of, and deviations from such works shall be carried out, whether they be extra works or not; and machinery is set up prescribing the mode in which this power is to be exercised, when the works are extra works, in order to entitle the contractor to be paid for the execution of them. But it must, I think, be necessarily implied that this power can be exercised in the first case only where the engineer honestly holds the opinion that the work he directs to be executed as work covered by the contract, and not extra work, is in truth and in fact work of the former character, and that where he directs extra work to be done, and puts into operation the above-mentioned machinery he must honestly be of opinion that the work he so directs to be done is in truth and in fact extra work. It would be a direct fraud upon the

contractor to insist that he should execute as contract work, covered by the contract price, work which he, the engineer, was fully convinced was extra work not covered by that price; while on the other hand it would be a fraud on his employers to direct in writing the contractor to execute as extra work, work which he, the engineer, was firmly of opinion was work covered by the contract price.

The contract must be construed as a whole, effect being given, so far as practicable, to each of its provisions. It was, I think, the bounden duty of the engineer towards the contractor to deal, as extra works, with those works which he was honestly of opinion were extra works, and it was equally his bounden duty to his employer not to treat as extra works those works which he was honestly of opinion were not of that character. However erroneous his opinion might be he could not be compelled to change it, or to act as if he had changed it. He could adhere to it to the last, and refuse to give any order in writing for the execution of works as extra works which he was honestly of opinion were not so. The provisions of the 13th clause of the specification support, I think, this view. It provides that no claim or demand shall be made against the corporation by reason of any supposed variations or additions or otherwise, unless the same shall have been ordered and claimed in manner herein directed, and shall also, in the opinion of the engineer, be other than the original contract work as intended by the specification. It is not very easy to see what was meant by the word "otherwise"; but this is, I think, clear that if the engineer gave a written order for works treating them as extra works, and all the formalities prescribed by the 5th clause of the specification were observed, the corporation would not be liable to pay for them if they were in a position to show that the engineer was not, at the time he gave the order, of opinion that the works were in fact other than original contract works. To make the corporation liable for extra works the engineer must not only order in writing the execution of the works, but he must in addition be of opinion that they are extra works. In the present case admittedly no order in writing

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was given by the engineer for the execution of the works claimed for as extra works, and he was, and, as far as appears, still is of opinion that the works are original contract works. In taking that view and acting upon it he is found not to have acted dishonestly, which must mean that he formed honestly the opinion upon which he acted. No suggestion was made as to how he could be forced to change his opinion, or to counterfeit and act upon an opinion which he did not hold in fact; but several suggestions were made as to how such an impasse as exists in the present case might be avoided. First it was urged that the contractor, being convinced that the work he was required to do was extra work, might have, or should have, taken the risk of his view turning out to be mistaken and have refused to execute the works unless and until an order in writing had been given by the engineer authorizing their execution, and the formalities prescribed by the fifth clause had been duly observed. It is desirable to consider what the possible consequences of such a refusal by the contractor might be. First, the progress of the work would be suspended in whole or in part. But by clause 92 of the specification the contractor is bound to carry out the several works commenced in proper sequence with due diligence, and in such order and manner as is by the contract prescribed, or as the engineer may require. And in case the contractor shall, in the opinion of the engineer, fail to do so, or shall neglect to provide a proper supply of materials, the engineer is authorized to employ, at his discretion, other contractors to do the work, and the corporation are enabled to charge the extra expense incurred thereby to the account of the contractor, or to deduct it from any sums of money due, or to become due, to him or recover it by action at law. It is obvious that if the contractor's view of the nature of the work he was required by the parol order of the engineer to do proved to be erroneous he would, by his refusal, have placed himself at the mercy of the engineer, and be rendered liable to the severe penalties imposed by this clause. Again, if instead of supplying and using Cyfartha clay, now decided, as the contractor had insisted, to be an extra which he was not

bound to supply and use without a written order, he had supplied and used clay other than Cyfartha clay, but of the quality specified in the specification, the engineer, still confident of the correctness of his own opinion, might under clauses 81, 85 and 86 of the specification have rejected the clay actually used, caused the structure in which it was used to be destroyed, required the contractor to have the debris removed, the clay he alleged to be inferior replaced by clay of which he approved, probably Cyfartha clay; and if the contractor should refuse to comply with these requirements the corporation were empowered to have these several things done by others at the contractor's expense.

These are some of the consequences which might ensue if as between the engineer and the contractor each resolutely stuck to, and acted upon, his own opinion as to the nature of the work required to be done, or the materials required to be supplied. It would, a priori, I think be natural to expect that where the parties by their contract provided an alternative mode of avoiding these embarrassing contingencies, and escaping from such an impasse—namely, arbitration—they intended that that arbitration should have a reach and operation adequate to solve the matters in dispute, and not an arbitration so restricted in its scope as to be absolutely abortive, leaving the parties to it in a position, for all practical purposes, the same as that which they occupied before it had been held. Yet, if the decision of the Court of Appeal be right, this latter, and only this latter, is what the arbitration held has actually effected, and what the parties by their contract, in conformity with their presumed intention, have provided that it should effect. The arbitrator has found that the opinion of the engineer was erroneous. He has not found that he did not honestly hold it, and does not still honestly hold it. He had not the power and does not profess to exercise the power to make him change his view and give an ex post facto order in writing, even if such an order would be valid and effective, which I gravely doubt. As far as the contractor's claim to be paid for the extra works he actually executed is concerned, the arbitration would, if the Court of Appeal be right, be little better than an expensive farce.

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Yet the 128th clause of the specification provides that the decision of the arbitrator is to be a final determination of the "dispute or difference" between the corporation, or the engineer on their behalf, and the contractor. The mere decision that the engineer was honestly mistaken in the view he held does not really decide anything finally, since it is open to him to stick to his opinion, as I think he was bound to do if, despite the finding of the arbitrator, he still honestly entertains it.

The works have been executed. What the contractor claims is that they should be paid for. The corporation and their engineer insist that he is not to be paid for them. I entirely concur with Bankes L.J. in thinking that the real dispute between the parties which was referred to the arbitrator, and which his award was to determine finally, was whether or not the contractor should under the circumstances be paid for the work he in fact executed, though no written order had been given for it by the engineer. That was the substance of the dispute, and the arbitrator was to finally decide it. Such a decision could alone terminate the controversy between the parties. There was no controversy about the giving of any written order for the execution of the work. It was admitted that no such order had been given. If the arbitrator had, under clause 128, jurisdiction to make a final decision upon any dispute or difference which might arise between the corporation or the engineer on their behalf and the contractor, that would include of course deciding on any subsidiary dispute involved in the main and substantial dispute referred. I concur, therefore, in the judgment of Bankes L.J. I think it was right. This conclusion does not involve the introduction of an implied term into the contract of the parties which can only be justified when the implied term is not inconsistent with some express term of the contract, and where there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that it is absolutely necessary to introduce the term to effectuate the intention of the parties: *Hamlyn & Co., Wood & Co.* (1) The conclusion merely involved the

(1) [1891] 2 Q. B. 488.

consideration of the contract as a whole, and the construction of its language, according to its natural measure, in such a way as will best reconcile its provisions the one with the other, and carry out the intention of the parties as disclosed by the language they have used. I do not think it necessary to deal with the contention that it was the duty of the contractor to have procured an arbitration to be held immediately upon a dispute having arisen touching the character of these works and before their execution. Such an early arbitration could only have been held by the consent of the parties, or in pursuance of the decision of an arbitrator in a preliminary arbitration on the point whether it should be held or not. I doubt very much whether it would not have substantially delayed or suspended the carrying out of the contract work, in whole or in part, with all the consequences I have indicated. An arbitration was not held, or applied for, by either side until the completion of the works, though disputes had early arisen. This goes to show, I think, that the dispute referred to arbitration was the substantial dispute I have mentioned. For these reasons I am of opinion that the decision of the Court of Appeal was erroneous and should be reversed, and the decision of Bray J. restored, and the appeal be allowed with costs here and below.

LORD SHAW OF DUNFERMLINE. My Lords, I agree. In the working out of this contract there are three cases to be considered. The first case is that of work admittedly within the contract. With regard to that it is, of course, conceded that no order in writing by the engineer was required. The second case is that of work admittedly outside of the specified contract work, and consisting of alterations, additions or deviations. With regard to these it is conceded that the corporation is not liable unless an order therefor by the engineer had been given in writing. The third case is that of work with regard to which there is no admission, but on the contrary the parties are at issue upon the question whether the work ordered by the engineer is within the contract or is an extra.

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This fundamental difference—upon which the parties are at issue—involves the other, namely, whether or not a written order is required. The engineer, holding certain work verbally ordered to be within the specification, can with perfect honesty decline to give a written order and yet insist on the work being done without any payment beyond the contract slump price. The contractor, holding with equal honesty that the work is extra work and must be paid for as such, can demand the protection of a written order and without that decline to go on.

My Lords, the facts of this case show that it falls within the third of this category. It is a mere begging of the question to say that the arbitrator before whom the parties have proceeded for a settlement of their disputes has, as the result of his inquiries, decided that the engineer's view was wrong and the contractor's view right, that therefore the work must now be treated as extra, and therefore again that it falls back into category 2, which required a written order, and should not be paid for because that order was not given. The work was done while these questions, as must be taken from the facts found by the arbitrator, remained unsettled questions, and questions the settlement of which by consent stood over. The arrangement was most natural, as a stoppage until they were tried and adjusted would have been greatly to the hindrance of the work and to the disadvantage of the parties. The contract appears to me to cover the third case as one suitable for and referred to arbitration. For by the 128th clause it was provided that "in case any dispute or difference shall arise between the corporation or the engineer on their behalf and the contractor . . . . during the progress of the work . . . . as to . . . . any objection by the contractor to any . . . . finding, decision, requisition or opinion of the engineer . . . . such dispute or difference shall be referred to the arbitration and final decision of a single arbitrator."

My Lords, failing an interim and immediate adjustment, the actual third case which I have put stood over as stated; and it has been settled by the arbitrator on findings that

the decision, requisition, and opinion of the engineer were wrong. And an award has been made for payment, which must be given effect to unless that part of the contract be written out, or the arbitration be a mere beating of the air.

The position is this: The arbitration started with the admitted fact that written orders for the work in question were not given; the arbitrator has decided that the work to the value of over 12,000*l.* was extra work; that written orders therefor were wrongfully refused by the engineer, and that the amount named is due to the contractor. In these circumstances why should not the respondents pay what is thus declared to be owing by them? To which the curious reply is made: The arbitrator has determined that the work was extra; this being so, it is naught to the purpose that the engineer wrongfully refused a written certificate for it. The fact is that there was none, therefore there can be no liability. In other words the arbitration is treated as having settled that there was no written order, from which it is alleged to follow in law that there must be no liability. But the fact that there was no written order was the very matter of admission which raised the dispute and gave rise to the arbitration: because of that admitted fact—founded upon a decision and opinion of the engineer—an arbitration was entered upon, the object of which was to settle whether—notwithstanding the absence of written order—a payment, and what payment, was due. And now that the arbitration is over it is found—so it is alleged—to have been an impossible arbitration from the first, as it could end in only one way. For if the arbitrator had determined that the engineer was right and the work was within the original contract, then nothing would have been due; whereas, although the arbitrator has determined the opposite, still there is nothing due because he has found that the engineer wrongfully refused a written order, and it therefore follows that the work was executed without such an order; that is to say, he has found the fact with which both parties approached him as an admission which raised the dispute which had to be settled. This is as complete a petitio principii as ever was introduced even into a legal argument. For

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whereas the contract provided for an arbitration to determine a dispute as to a decision or opinion of the engineer, and the dispute was terminated by an award that he was wrong, yet the contract means that—no matter whether the engineer was wrong or right—the determination either way can only have a result in the one way—namely, that the contract protects the respondents from payment. My Lords, in my opinion this is to misinterpret the contract, and to reduce it to self-contradiction and futility.

It may in general terms be stated that wherever a dispute is remitted to arbitration on admitted fact, it must be assumed that the fact admitted was not conclusive of the point to be determined, and that the arbitrator is free to make an effective award upon one view in one direction and upon another view in another direction. The arbitrator's award appears to me to bring the case back to exactly that point at which it should have been placed to begin with by a written engineer's order having been given. This was wrongfully refused. In my opinion the rights of parties are to be determined on the footing that this wrongful refusal had not been made. That is to say, the award stands in effect in place of the written order, and the work must be paid for and the price thereof settled as the arbitrator has found.

LORD SUMNER. My Lords, it is my misfortune to be unable to take the same view of this contract as your Lordships. I think that the judgment appealed from was right, for the reasons given by my noble and learned friend Lord Sterndale.

LORD WRENBURY. My Lords, in this case one thing is plain—namely, that the "opinion" of the engineer and the "decision" of the engineer upon the question whether any work or any materials are "extra work or works" are arbitrable within article 128 of the specification, and that the determination of the arbitrator in the matter is final and conclusive. He has awarded that the engineer required the contractor, without further payment, to execute work and supply materials in excess of the work and materials which the contractor had undertaken to execute and supply.

In brief, he has awarded that the items in question are extras, and that their value is not included in the contract price. That is final and conclusive. He has further awarded payment. The respondents do not, and cannot, deny that it is finally determined that the items are extras and have not been paid for, but they say that that decision results in nothing because an order in writing is a condition precedent to payment, and payment cannot be obtained because the engineer refused —and wrongly refused—to give an "order in writing." If the contract in express words, or by necessary implication, provides that an arbitration for which it makes provision shall be wholly futile and shall result in nothing at all no doubt effect must be given to it—but as a principle of construction I conceive that the contract ought to be construed, if it can be construed, so as to escape so improbable and so senseless a result. The question is whether the absence of an order in writing, which the engineer wrongly refused, precludes the contractor from recovering sums which the arbitrator has finally decided are the value of work additional to that covered by the contract price.

The question of the right to payment turns upon article 15 of the contract, article 3 of the special notice (which is mentioned in article 15 of the specification), and articles 4, 5, 13, 124, and 125 of the specification. Article 15 of the contract entitles the contractor to the lump sum of 201,077*l.* 7*s.* 4*d.*, with the addition of such sums as shall be determined by the engineer to be reasonable in respect of alterations, additions, or variations in the works. So far as this article is concerned the determination of the engineer is open to review by an arbitrator under article 128 of the specification. Article 4 of the specification again entitles the contractor to have added to the amount of the contract the value of additions, alterations, or substitutions in the construction of the works, according to the judgment of and the admeasurements and valuations to be made by the engineer. This, again, is open to review by an arbitrator. Article 5 of the specification consists of two parts. The former relates to instructions to be given by the engineer for the guidance of the contractor and the

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good and sufficient execution of the works, and such instructions are to be treated as if they had accompanied or had been mentioned in the specification. These instructions may be verbal. These, however, relate only to matters included in the contract; they do not extend to additional works which are not within the contract. "Works" by virtue of the definition clause (article 1 of the contract) includes materials to be supplied by the contractor. The later part of article 5 provides that the engineer may "also" alter or vary as there mentioned or order further works, and the corporation are not to be liable unless the instructions under this second part "shall have been given in writing by the engineer, nor unless such instructions shall have distinctly stated that the matter thereof is to be the subject of an extra or varied charge, nor unless the claim therefor shall have been made in writing by the contractor within fourteen days of the time at which such work was executed," and before the materials had been placed out of view and so on. The article contains specified forms of written order and of claim. These show that the written order is to be for additional or substituted work, and that the claim is in respect of "other than original work," and is a document which is to be subsequent to the written order. The respondents rely upon this article. They say that because the engineer refused to give a written order, which it has been finally decided he ought to have given, the contractor cannot recover the value of works which the arbitrator has found to be extras not included in the contract price.

Before discussing this article further, I pass to article 13, which is most strongly in favour of the respondents' contention. That article provides that no claim or demand shall be made against the corporation "by reason of any alleged or supposed variations or additions or otherwise howsoever unless the same shall have been ordered and claimed in manner herein directed, and shall also in the opinion of the engineer be 'other than original contract work' as intended by this specification." As regards the latter of these the opinion of the engineer is arbitrable under article 128. It has been arbitrated, and the engineer has proved to have been wrong. As regards the former

of them the variations or additions with which we have to do are not "alleged or supposed" but have been finally determined to exist. The words "or otherwise howsoever" cannot be general, but must mean "by reason of any other matter relating to the alleged or supposed variations or additions," for they are followed by the words "unless the same." The result is that this clause speaks always subject to the arbitration clause, for under its provisions the true nature of the variations or additions and the correctness of the opinion of the engineer are alike subject to review by the arbitrator. Article 124 provides that no certificate shall create liability to pay for alterations or additions not ordered in writing. But a certificate is not a final document; it is open to review by the arbitrator. Article 125 again refers to the order in writing.

My Lords, I now turn back to article 5. The point here is this. The engineer's view (which turns out to have been wrong) was that his instructions or orders in the matters in dispute were not within those provisions of that article which require an order in writing. His case, therefore, was, and his employers' case was, that the second part of article 5 did not apply. They cannot now say that, but they say that because the fact was that the matter did fall within the second part of the article (which they denied) the corporation can refuse repayment by reason of their own wrongful act committed by their engineer—that the arbitrator can award, and has awarded, that the engineer was wrong, but that neither the arbitrator nor any Court can enforce payment of the amount which but for the wrongful refusal of the corporation's agent would beyond question have been payable. My Lords, I cannot accept that view. The arbitration clause extends to any dispute between the corporation or the engineer on their behalf, and the contractor. The question whether the engineer ought to have given a written order is within those words. It extends to "any matter or thing arising" under the contract. The right to payment under the contract is a matter arising under it. Of course so far as that right depends upon the true construction of the contract that is matter of law. But assuming that as matter of law upon the

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construction of the contract it is possible that payment is due, it is for the arbitrator to say whether upon the facts it is due or not. In other words, if the arbitrator can—as he can—review the action of the engineer in refusing an order in writing it must be that in reviewing he is by the contract empowered so to do, not idly and without result, but that he can as arbitrator give effect to that review by finding that the money is due, because the engineer was, as he finds, wrong in refusing the order which he was contractually bound to give. Article 5 as well as article 13 speaks subject always to the arbitration clause. This construction brings article 5 into harmony with article 15 of the contract and article 4 of the specification.

My Lords, reliance was placed by the respondents upon such provisions of the contract as those relating to the contractor's claim being made in writing within a limited time, and before the work is covered up, and so on. I do not think these assist them. The engineer's attitude was that he was right in refusing an order—that there was no ground for a claim—that no purpose would be served by keeping the work uncovered, and so on. He must be taken to have known that there was room to find—as it has been found—that he was wrong. The corporation cannot be heard to say that they have suffered any injury by the absence of steps all of them subsequent to and required only in case the engineer had signed the order which he wrongly refused to sign.

One other matter requires notice which throws a good deal of light upon the question to be answered. An immediate arbitration upon any current and vital question arising in carrying out the work (say the question what clay shall be used or how the cement shall be mixed) could be obtained only by the consent of both parties. Failing consent a preliminary arbitration was to be held to decide whether there should be an immediate arbitration or not. Suppose the arbitrator decided that there should not be an immediate arbitration. I will assume that the contractor was going to use materials which he said were proper within the contract, and that he was right in that, and that the engineer denied it, required other and more expensive materials, but refused

his order in writing. What is the contractor to do? Suppose he refuses under those circumstances to go on with the contract. Then under article 81 the engineer may reject the materials (which by the hypothesis he had no right to do), the contractor must then remove them under article 85 and supply the more expensive materials. If he does not do so the engineer on behalf of the corporation may, under article 86, remove them and supply the more expensive materials at the expense of the contractor, and under article 92 may visit the contractor with the consequence that, because there was a dispute in which the engineer was wrong and the contractor was right, other contractors shall be employed and the contractor shall be charged with all the expenses. I cannot find it possible to contemplate that the contracting parties intended that such consequences should ensue when the contractor was right throughout, but could not obtain an immediate decision that he was right, and yet that he should not be able ultimately to obtain an award in his favour which should be not a mere barren decision of an academic question but a decision which should be followed by the exercise of an authority in the arbitrator to give the contractor the pecuniary equivalent of his success.

My Lords, in my opinion the decision of this case turns upon the fact that the arbitration clause is paramount to every provision of the contract other than the excepted matters which that clause provides shall be "in the absolute and final discretion of the engineer." I rest my judgment not upon any authority of the arbitrator to waive a condition precedent, or to supply the want of the engineer's order in writing, but upon holding, as I do, that the arbitration clause has remitted it to the arbitrator to determine that work or materials are extras, and that payment is due for them under the contract, notwithstanding that the engineer wrongly as the arbitrator finds, refused to give an order in writing

My Lords, in my opinion the appeal succeeds.

Order of the Court of Appeal reversed and order of Bray J. restored, except as to claim No. 1 (*Rates and Taxes*). *The respondents to pay*

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the costs in the courts below, except as to claim No. 1, in respect of which the respondents may set off their costs thereof before Bray J. and in the Court of Appeal, and also the costs of the appeal to this House.

Lords' Journals, December 17, 1918.

Solicitors for the appellant: *Kendall, Price & Francis.*

Solicitors for the respondents: *Smith, Rundell, Dods & Bockett, for J. L. Wheatley, Cardiff.*

[HOUSE OF LORDS.]

H. L. (E.,* 1918 Dec. 16.

NEVILLE . . . . . APPELLANT;

AND

LONDON "EXPRESS" NEWSPAPER, LIMITED . . . . . RESPONDENTS.

ET E CONTRA.

Maintenance—Civil Action—Competency—Success of maintained Action—Absence of Special Damage.

An action for damages for maintenance will not lie in the absence of proof of special damage.

So *held* by Lord Finlay L.C., Lord Shaw of Dunfermline, and Lord Phillimore; Viscount Haldane and Lord Atkinson dissenting.

The success of the maintained litigation, whether an action or a defence, is not a bar to the right of action for maintenance.

So *held* by Lord Finlay L.C., Viscount Haldane, and Lord Atkinson; Lord Shaw of Dunfermline and Lord Phillimore dissenting.

Wallis v. *Duke of Portland* (1797) 3 Ves. 494; (1798) 8 Bro. P. C. 161 applied.

Scott v. *National Society for the Prevention of Cruelty to Children* (1909) 25 Times L. R. 789, and *Oram* v. *Hutt* [1914] 1 Ch. 98, approved.

Dictum of Lord Abinger C.B. in *Findon* v. *Parker* (1843) 11 M. & W. 675, 682 explained and distinguished by Lord Atkinson.

Dictum of Lord Coleridge C.J. in *Bradlaugh* v. *Newdegate* (1883) 11 Q. B. D. 1, 15 considered.

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* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PHILLIMORE.

Order of the Court of Appeal [1917] 2 K. B. 564, upon the question of maintenance, discharged, and judgment entered for the defendants on this head.

APPEAL and cross-appeal from an order of the Court of Appeal. (1)

The facts are fully stated in the judgments. The following summary may be useful for the purposes of the argument.

The plaintiff (the appellant in the original appeal), who contemplated laying out land which he had purchased on the South Coast as a building estate, offered a prize of 100*l.* for a name for a new South Coast resort. He also offered fifty consolation prizes stated to consist of splendid freehold building plots similar to those offered by the plaintiff at 50*l.* each, subject to a proviso that the winners should pay three guineas for a conveyance of each plot. Each conveyance was contained in a printed form filled up according to the number and description of the plot. The 100*l.* was awarded for the name of New Anzac-on-Sea. In addition a very large number of consolation prizes were awarded.

The defendants (the respondents in the original appeal) published a series of articles in their newspaper alleging that the competition was not bona fide, and that the consolation prizes were really sales of land at a profit, and offering to take legal proceedings at their own expense on behalf of all prizewinners who sent in their names to the defendants' solicitors, for the recovery of the three guineas. A large number of persons, who were represented by the defendants' solicitors, joined together in two actions tried by Younger J., who held that the plaintiffs were induced to enter into their contracts by the fraudulent representations of the defendant, the present plaintiff, and ordered the return of the moneys paid by them.

In the meantime the plaintiff commenced an action against the defendants for damages for libel and maintenance. This action was tried before Lord Reading C.J. and a special jury after the trial of the Chancery actions. Upon the claim for libel the jury found for the plaintiff and awarded him 300*l.*

(1) [1917] 2 K. B. 564.

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damages. Upon the claim for maintenance the jury found that the defendants did not act from motives of charity or in the bona fide belief that the plaintiffs in the Chancery actions had a well-founded claim against the present plaintiff. By consent of the parties the assessment of the damages on this head of claim was left to the Lord Chief Justice. Lord Reading gave judgment for the plaintiff upon the claim for libel in accordance with the verdict, and upon the findings of the jury on the claim for maintenance, following *Bradlaugh* v. *Newdegate* (1), he awarded the plaintiff as damages the costs which he had to bear in defending the Chancery actions and the costs which he had to pay the plaintiffs in those actions.

The Court of Appeal (Swinfen Eady L.J., Scrutton L.J., and Bray J.), upon motion for a new trial or judgment, ordered a new trial of both claims on the ground that the verdict was against the weight of evidence and perverse.

The plaintiff now asked that the judgment of Lord Reading should be restored, and the defendants asked that judgment should be entered for them on both claims.

The arguments are reported on the question of maintenance only.

1918. Oct. 18, 21, 22, 24, 25. *Harney* for the plaintiff.

Sir E. Pollock K.C. (with him *Sir Hugh Fraser*) for the defendants were heard upon the cross-appeal only.

The success of the maintained action is an absolute bar to the right of action for maintenance. The offence of maintenance is confined to officious intermeddling; the idea underlying maintenance is that of stirring up strife for vexation or delay. Maintenance must be "something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary": Pollock on Contracts, 8th ed., p. 361, quoting Sir John Coleridge in *Fischer* v. *Kamala Naicker*. (2) Tried by these tests it is not an offence to

(1) 11 Q. B. D. 1. (2) (1860) 8 Moo. Ind. Ap. 170, 187.

maintain an action which ought to be brought, for it is impossible to say that a man is guilty of any officious interference or of vexatiously stirring up strife when all that he has done has been to assist in righting a wrong. The old law as stated in the institutional writers, Coke's Second Institute, p. 112; Hawkins' Pleas of the Crown, 8th ed., vol. 1, pp. 454-463; Fitzherbert's Abridgment, Tit. Mayntenance de briefe, pars. 17, 26; Viner's Abridgement, Tit. Maintenance (F) 3; (U) 9, has been to a large extent modified by subsequent decisions, and many of the illustrations given by those writers would certainly not amount to maintenance at the present time. Maintenance is an offence at common law, but is regulated by a series of ancient statutes which are consolidated in 32 Hen. 8, c. 9. That statute speaks of unlawful maintenance, thus indicating that the maintenance which alone is included in the criminal offence is such as is described above. The views of the Court as to maintenance have gradually relaxed (*Master* v. *Miller* (1)), and the tendency of modern times is to restrict the doctrine to the narrowest limits. *Wallis* v. *Duke of Portland* (2) is distinguishable. That was a case of an election petition; the proceedings were attacked on various grounds, and it does not clearly appear from the report in the House of Lords on what ground Lord Loughborough's decision was affirmed. In *Bradlaugh* v. *Newdegate* (3) the real point was whether an action of maintenance lay at all, but some of the dicta of Lord Coleridge in that case require consideration. It has always been recognized that maintenance may be justified where the maintainer has a common interest with the litigant in the subject-matter of the suit, or where he is actuated by charity: Blackstone, Book IV., c. 10, § 12. But the only ground for treating charity as an exception is that it cannot be against public policy, and that would equally include this case. *Alabaster* v. *Harness* (4) and *Oram* v. *Hutt* (5) do not affect the question, as the judgments really turned on the meaning

(1) (1791) 4 T. R. 320, 340.
(2) 3 Ves. 494; 8 Bro. P. C. 161.
(3) 11 Q. B. D. 1, 9, 15.
(4) [1894] 2 Q. B. 897; [1895] 1 Q. B. 339.
(5) [1914] 1 Ch. 98.

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of common interest. Hawkins' statement that the offence of maintenance arises independently of the success or failure of the maintained action is not now the law of the land. In *Findon* v. *Parker* (1) Lord Abinger states that the law of maintenance "is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make." This statement of the law was adopted by the Court of Appeal in *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.* (2), and Moulton L.J. there states that the old common law doctrine of maintenance is founded on notions which have long since passed away and is to a large extent obsolete. *Flight* v. *Leman* (3) also supports the defendants' argument, since it shows that it is an essential element of an action for maintenance that the suit should have been maintained without reasonable or probable cause, and the case was treated as analogous to a complaint for malicious prosecution. And see *Pechell* v. *Watson* (4); *Harris* v. *Brisco* (5); *Metropolitan Bank* v. *Pooley.* (6) In *Scott* v. *National Society for the Prevention of Cruelty to Children* (7) Bray J. held that the result of the maintained action was immaterial in determining a claim for maintenance, but he gives no reasons for that decision, and it is submitted it is wrong. Coke gives as the reason for making maintenance a criminal offence, that thereby common right is delayed and disturbed, and Blackstone, that it perverts the remedial process of the law into an engine of oppression. Those reasons support the view that the success of the maintained action is a bar to a claim for maintenance. An action for maintenance will not lie in the absence of proof of actual pecuniary damage. Viner says that persons guilty of the offence of maintenance are "liable to an action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff." But

(1) 11 M. & W. 675, 682.
(2) [1908] 1 K. B. 1006, 1012, 1020.
(3) (1843) 4 Q. B. 883, 888.
(4) (1841) 8 M. & W. 691.
(5) (1886) 17 Q. B. D. 504.
(6) (1885) 10 App. Cas. 210, 217.
(7) 25 Times L. R. 789.

what injury can a man be said to have suffered who has been compelled by the maintained action to refund money which he has fraudulently received? It is no injury to make a man pay his lawful debts.

[He also referred to *Prosser* v. *Edmonds* (1); *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (2); *Grant* v. *Thompson* (3); *Fitzroy* v. *Cave* (4); *Holden* v. *Thompson*. (5)]

Harney contra.

It is said that damage is an essential ingredient of an action of maintenance, and that there is here no damage. It is conceded that the cases where maintenance lies have been gradually narrowing, but the broad principle of officious intermeddling remains unimpaired—i.e., intermeddling in a suit which in no way belongs to one. As pointed out by Moulton L.J. in *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.* (6) some elasticity is given to the term "officious" to meet the exigencies of modern society, because otherwise absurd results would follow. But assuming that there has been here an officious intermeddling does this action fail merely by reason of the success of the maintained actions? Bray J. has decided the contrary in *Scott* v. *National Society for the Prevention of Cruelty to Children* (7), and Lord Coleridge would have given the same decision in *Newdegate* v. *Bradlaugh* (8) if the House of Lords had not relieved Bradlaugh from the penalties. Except as above stated there is no direct decision on the point, but there are a number of cases, such as *Wallis* v. *Duke of Portland* (9) and *Oram* v. *Hutt* (10), which point in the same direction. The plaintiff's case is that the mere infringement of the right creates a cause of action, as in *Ashby* v. *White*. (11) There are two well-defined types of tort—e.g., trespass and negligence. Where a right exists in the individual, no matter how created, the invasion of that

(1) (1835) 1 Y. & C. Ex. 481, 497.
(2) (1876) 2 App. Cas. 186, 208-210.
(3) (1895) 72 L. T. 264.
(4) [1905] 2 K. B. 364.
(5) [1907] 2 K. B. 489.
(6) [1908] 1 K. B. 1006, 1013.
(7) 25 Times L. R. 789.
(8) 11 Q. B. D. 1.
(9) 3 Ves. 494; 8 Bro. P. C. 161.
(10) [1914] 1 Ch. 98.
(11) (1703) 2 Ld. Raym. 938; 3 Ld. Raym. 320; 1 Sm. L. C. (12th ed.) 266.

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right gives a right of action. That is the first class. But where a duty is owed by everyone to the public, the breach of that duty gives no right of action to a private person in the absence of actual damage. That is the second class. Maintenance falls under the first class. The test is: Is the wrong complained of one in which you have the right to ask the Court to interfere, quia timet, before any damage is done? And the authorities show that the plaintiff in an action of maintenance has that right. That negatives the idea that the right of action depends on the success or failure of the maintained litigation. Every subject is entitled to be immune from any attack except from the party with whom the quarrel exists, and who must take the risk of the costs. As regards the measure of damages this is not a case of nominal damages but a case in which the judge should direct the jury that the three guineas had been obtained by fraud. The action for maintenance is like an action for slander or assault, where the cause of action is the infringement of the personal right, although no actual damage has been suffered.

Sir Hugh Fraser in reply on the cross-appeal. For an action of maintenance to lie there must be something unlawful or improper in the maintenance. Damage is the gist of the action, just as it is the gist of the civil action for conspiracy: Pollock on Torts, 10th ed., p. 335.

The House took time for consideration.

Dec. 16. LORD FINLAY L.C. My Lords, in this case the appellant, Mr. Neville, brought an action for libel against the respondents in respect of a series of attacks upon him which appeared in the "Daily Express" in January and February, 1916, reflecting upon his conduct with regard to an estate which he had purchased on the coast of Sussex and was endeavouring to develop into a seaside resort under the name of New Anzac-on-Sea.

The Statement of Claim alleged that the defendants meant and were understood to mean that the plaintiff was carrying

on a fraudulent and dishonest business and was obtaining money by deception and false pretences. The plaintiff further claimed damages on the ground that the defendants had "maintained" certain persons in bringing actions against the plaintiff in the Chancery Division. The defendants in their defence denied the innuendoes alleged with regard to the libel and pleaded that the words complained of were in their natural and ordinary meaning true in substance and in fact, and, so far as they consisted of comments, that they were fair comments upon a matter of public interest. With regard to the claim for maintenance, the defendants denied the maintenance and alleged that the actions were necessary and proper in the public interest and that they were entitled to maintain the actions on the ground of public duty or alternatively on the ground of charity and benevolence towards the plaintiffs in these actions.

The case was tried before the Lord Chief Justice and a special jury. The trial lasted for 9 days. Five questions were put to the jury and answered by them as follows:— "As to the libels. (1.) Are the statements substantially true? No. (2.) Is the comment fair and made bona fide? No. (3.) Damages?—300*l*. As to maintenance. (4.) Did the defendants act from the desire to assist persons to prosecute claims who would not otherwise have been able to enforce their rights?—No. (4b.) Did the defendants act solely from this desire?—No. (5.) Did the defendants act in the bona fide belief that the persons who sued had a well-founded claim against Neville?—No." The claim for maintenance was argued on further consideration before the Lord Chief Justice, and he decided that on the findings of the jury judgment should be entered for the plaintiff for the amount of the taxed costs which he had to pay to the successful plaintiff in the Chancery actions, and for the costs incurred by him in these actions to be taxed as between solicitor and client. Judgment was entered accordingly for the plaintiff on the libel claim for 300*l*., and on the claim for maintenance with costs.

An appeal was brought to the Court of Appeal consisting of Swinfen Eady L.J., Scrutton L.J., and Bray J., who decided

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that the judgment for 300*l.* damages for the libels must be set aside and ordered a new trial. They also held that the findings in the claim for maintenance must be set aside as against the evidence and perverse, and directed a new trial as to this part of the action also. The plaintiff has appealed to this House against the order for a new trial and asks that the judgment in his favour on both heads of claim should be restored. The defendants by a cross-appeal ask that judgment should be entered for them both on the claim for libel and on the claim for maintenance. In my opinion, this House ought to let the order for a new trial stand as regards the libels. It is unnecessary, and, in view of the fact that the case is to be tried again, undesirable that we should give any detailed judgment on the circumstances of the case. It seems to me quite impossible that the findings of the jury as to the libels should stand in view of the evidence and the undisputed facts in the case. It is equally impossible to accede to the request of the defendants that judgment should be entered for them upon the libels. This could be done only if there was no evidence fit to be left to the jury in support of the plaintiff's claim, and in my opinion it is impossible so to hold. There was evidence to go to the jury, and upon the new trial a fresh jury will have to decide upon the rights of the parties.

I now pass to the consideration of the question whether the defendants are entitled to have judgment entered for them on the claim for maintenance. The facts relating to this part of the case are as follows: Mr. Neville (plaintiff) invited the public to send in suggestions for the name of the seaside resort which he proposed to establish on his estate in Sussex. He offered prizes for suggestions; the first prize was to be 100*l.* in cash and there were to be 50 other prizes consisting of freehold plots on the estate. Each winner was to have a conveyance of his plot on sending in the sum of three guineas for the cost of a conveyance duly stamped. A very large number of suggestions were sent in and some 12,500 persons were informed by Mr. Neville that they had been successful in the competition and would be awarded prizes or consolation prizes in the shape of

plots of land on payment of 3 guineas for the conveyance. Over 2000 persons took up the conveyance and paid 3 guineas each. The defendants in their newspaper invited all who had done so to bring actions to recover the sums they had paid on the ground that they had been obtained from them by fraud, and 125 persons sued together in two such actions which were brought before Younger J., and the plaintiffs' costs in the litigation were borne by the defendants in the present action. The Lord Chief Justice in his judgment on further consideration described what occurred in these actions as follows :—" When the trial commenced counsel appearing for Mr. Neville, the defendant in the action, submitted to the payment of the sums of money claimed, but counsel for the plaintiffs insisted on his right to open the case and proceed with his proof, and then to elect in what form he would ask for his remedy. Argument took place, and in the result Mr. Justice Younger held that the plaintiffs in those actions were entitled to open their case and prove it. Thereupon the defendant, by his counsel, who was acting under specific instructions from his client, withdrew from the defence and left the case to be proceeded with in his absence. In the result, evidence having been called, the learned judge gave judgment for these plaintiffs, all of whom recovered except 11, who, for reasons unnecessary to state, were not willing to be joined as plaintiffs, and consequently had to be dropped out of the action. The result was therefore that 114 out of 125 plaintiffs recovered their three guineas each, and they recovered them with costs." The judgment declared " that the plaintiffs in each action were respectively induced to enter into the contracts in the pleadings mentioned with the defendant by his fraudulent misrepresentation," and went on to order that the contracts with the exceptions mentioned in the schedule be rescinded, and that each of the plaintiffs in these actions should recover against the defendant the sum of three guineas and costs. That judgment has never been appealed against, and it is in my opinion shown to be right by the evidence in this case. The claim in this action for maintenance is in respect of the promotion of these actions by the present defendants.

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On the further consideration, the Lord Chief Justice held that the action in respect of the maintenance was well laid, although Mr. Neville had been found guilty of fraud and ordered to return the several sums of three guineas. In other words, he decided that the fact that the actions mentioned were rightly brought and succeeded did not prevent Mr. Neville the present plaintiff from recovering damages against the present defendants for maintaining these actions. The Lord Chief Justice in dealing with the quantum of damages said that the amount of damages which he felt bound to give according to law was not in accordance with his own views, and proceeded to give judgment in Mr. Neville's favour as I have already stated for the costs he had been put to by the litigation. In dealing with this part of the case the findings of the jury with regard to the maintenance must be accepted. In other words, it must be assumed for this purpose "that the defendants did not act from the desire to assist persons to prosecute claims who would not otherwise have been able to enforce their rights," and that the defendants did not act in the bona fide belief that the persons who sued in the actions maintained by them had a well-founded claim against the plaintiff. These findings were stigmatized by the Court of Appeal as against the evidence and perverse, but the question with which we have now to deal is one purely of law, whether, even on the assumption that the facts were as this jury found them, Mr. Neville is entitled to recover for maintenance. It was contended on behalf of the present defendants that judgment must be entered for them on this head of claim on the ground that no person can succeed in an action for maintenance unless he can prove that he has sustained special damage thereby, and that in the present case there was no damage to sustain the action, and also upon another and broader ground to which I shall advert hereafter.

Maintenance in a court of justice is defined in Hawkins' Pleas of the Crown (8th ed., published in 1824, vol. I., c. 27 (6), s. 3, at p. 454) as being "where one officiously intermeddles in a suit depending in any such court which no way belongs to him, by assisting either party with money,

or otherwise, in the prosecution or defence of any such suit." He goes on to point out, however, that acts of this kind may be justified in various cases—e.g., if there is an interest in the thing at variance, in respect of kindred or affinity, in respect of other relations as lord and tenant or master and servant, or in respect of charity. In s. 26, p. 460, the learned author says: "It seems to be agreed, that anyone may lawfully give money to a poor man to enable him to carry on his suit." In s. 38, p. 462, he says: "It seemeth that all maintenance is strictly prohibited by the common law, as having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits, which perhaps they would not venture to go on in upon their own bottoms; and therefore it is said, that all offenders of this kind are not only liable to an action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also that they may be indicted as offenders against public justice, and adjudged thereupon to such fine and imprisonment as shall be agreeable to the circumstances of the offence. Also it seemeth, that a court of record may commit a man for an act of maintenance done in the face of the Court."

The action for maintenance is, in my opinion, one which can be sustained only if special damage has been occasioned to the plaintiff by the maintenance. The maintenance may be punishable as an offence, but to give a right of action the commission of the offence must have caused damage to the plaintiff. Of course, if a right has been infringed, as in *Ashby* v. *White* (1) where a man was deprived of his right to vote, no proof of damage is necessary. As Lord Holt expressed it "an injury imports a damage, when a man is thereby hindered of his right." The same rule applies if an assault, even the most trifling, is committed, though it occasions no damage whatever, or if trespass is committed to the plaintiff's land or goods. But the action for maintenance at common law is not, in my opinion, an action for the invasion

(1) 1 Sm. L. C., 12th ed., 263, 288; 2 Ld. Raym. 938, 955; 3 Ld. Raym. 320.

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of a right; it is an action in respect of an offence which causes damage to the plaintiff. This class of action was discussed in *Couch* v. *Steel* (1), in *Atkinson* v. *Newcastle and Gateshead Waterworks Coy.* (2), and in a passage of Lord Herschell's judgment in *Cowley* v. *Newmarket Local Board.* (3) In my opinion it cannot properly be said that maintenance invades a right within Lord Holt's rule so that an action will lie without damage. The criminal law prohibits and may punish the act, but in the absence of damage the remedy is not by civil action. When Serjeant Hawkins says, as he does in the passage which I have above quoted, that offenders of this kind are liable to an action of maintenance at the suit of the party aggrieved wherein they shall render such damage as shall be answerable to the injury done to the plaintiff, I think he means that the recovery is to be in respect of damage, not that nominal damages may be recovered even if the plaintiff has sustained no damage whatever. An action to recover damages in respect of maintenance is, of course, quite different from an action to recover penalties which by certain statutes have been imposed in respect of various kinds of maintenance. In such actions for penalties the person guilty of maintenance is liable to pay the amount of the penalty to the person who sues for it by force of the statute, while in the common law action for damages he is liable only if damage be proved. In the present case there is no damage. The plaintiff, it is true, has had to repay money which he had obtained by fraud and to pay costs in respect of his having resisted payment. It cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them. If it were otherwise the consequences would be extraordinary. It would follow that if A. sues with the help of C. to recover a debt which is due to A. from B., and B. defends the action and has judgment against him, B. would then be entitled to sue C. for maintenance and recover from C. the whole of the debt which he

(1) (1854) 3 E. & B. 402. (2) (1877) 2 Ex. D. 441.
(3) [1892] A. C. 345, 352.

had been compelled to pay and all the costs incurred by reason of his wrongful defence. And a result still more remarkable would on such principles follow in case of maintenance of a defence, for if A. sued B. on a wrongful claim and C. supplied B. with money to make good his defence, A. could sue C. for maintenance on the ground that C. had prevented him from succeeding in a wrongful claim and could recover the amount of the claim with the costs which he had incurred in trying to enforce it.

Lord Coleridge in *Bradlaugh* v. *Newdegate* (1) would appear to have been prepared to proceed on the admission made by counsel that the penalty in that action, if recovered, and the costs incurred in resisting the proceedings for it might be got back in an action for maintenance. But as the House of Lords afterwards decided that the penalty was not recoverable at all the point did not arise. I think there may be a difference in this respect between actions for penalties and actions for a debt due, but it is unnecessary for the purposes of the present case to decide this point. As there was no damage in the present case, I am of opinion that the action for maintenance must fail and that judgment must therefore be entered for the defendants on this head of claim. I think it would be futile to send the case down for a new trial even if it were regarded as one in which for the maintenance of the action proof of damage is not necessary. We have all the facts before us, and it is clear that even on this view only nominal damages could be recovered. Any verdict giving substantial damages on these facts would be perverse and would be set aside. If then the action for maintenance were to be regarded as one for the invasion of a right, to sustain which special damage is not necessary, the proper course would be to give judgment for the plaintiff for nominal damages. But, in my opinion, this head of claim fails altogether.

I am unable to agree with the broader proposition put forward on behalf of the respondents, the Newspaper Company, to the effect that no action can be maintained for maintenance unless the action or defence maintained has failed. Nor

(1) 11 Q. B. D. 1, 15.

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can I assent to the proposition that the offence of maintenance exists only when the claim or defence maintained is unfounded or when it has been maintained by procuring false evidence or in some other unlawful way. Maintenance is a common law offence. It was not constituted by statute, although statutes have been passed imposing penalties on particular kinds of maintenance. As regards maintenance at common law, there is not, so far as I am aware, any authority in support of either of the above propositions. The essence of the offence is intermeddling with litigation in which the intermeddler has no concern, unless the case falls under some of the heads of exception to which I have above adverted. It was considered that it is against public policy that litigation should be promoted and supported by those who had no concern in it. Blackstone in his Commentaries (Book IV., c. 10, s. 12) after reproducing in substance Hawkins' definition of maintenance says: "This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression." Lord Coke in the Second Institute (p. 212) defines maintenance thus: "Maintenance is an unlawfull upholding of the demandant or plaintiff, tenant or defendant in a cause depending in suit, by word, writing, countenance, or deed. This maintenance (as hath been said) is malum in se, and against the common law, and that is notably proved by this Act" (Westminster 1st c. 28), "for hereby maintenance is branded with this quality that thereby common right is delaied, or disturbed, and consequently against the common law." Champerty is a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute. At p. 208 of the same Institute Lord Coke says: "Every champerty is maintenance, but every maintenance is not champerty, for champerty is but a species of maintenance, which is the genus. It was an offence against the common law; for the rule of law is culpa est se immiscere rei ad se non pertinenti. And, pendente lite nihil innovetur."

The promotion of suits and defences by one who has nothing to do with them may undoubtedly lead to grave abuses and

was regarded by the common law as against public policy. No doubt in former centuries the doctrine was pushed to extreme lengths, and decisions were given which would not now be followed, but there is, I think, good sense underlying the doctrine, and it seems to me impossible to say that it is not part of the Common Law of England. Lord Coke observes ubi supra (p. 213) that "manutenentia curialis is divided into lawfull, and unlawfull." This appears to me to refer to the distinction between maintenance promoted by charity or falling within some other of the excepted cases, and therefore lawful, and maintenance by intermeddling with another's suit in any case not falling within the exceptions, and therefore unlawful. That the offence of maintenance was irrespective of the rights or wrongs of the particular suit in which it took place would appear to be indicated by the fact that a writ might be obtained to restrain the maintainer from going on with the maintenance. It would, of course, have been impossible on such an application to try the case in which maintenance occurred upon its merits, but as the maintenance was wrongful, whether the suit maintained ultimately turned out to be right or wrong, it might at once be restrained.

The case of *Wallis* v. *Duke of Portland* (1) is decisive against the proposition that the proceedings maintained must have failed. In that case there was a demurrer to a bill for discovery in aid of a proposed action against the Duke of Portland as having employed Mr. Wallis to conduct a petition praying that Sir George Jackson, who had been returned as Member of Parliament for the Borough of Colchester, should be unseated, and that Mr. Tierney should be declared duly elected. The petition succeeded, and Mr. Tierney became member for Colchester. The demurrer was supported on the ground of maintenance, and it was said that as the action for the costs which Mr. Wallis had incurred on the Duke's retainer must fail on this ground, the discovery should not be allowed in aid of it. Lord Loughborough C. allowed the demurrer on this ground and he was affirmed in the House of Lords. The report of the case in the House of Lords states in the headnote

(1) 3 Ves. 494; 8 Bro. P. C. 161.

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that the demurrer was allowed on the appeal "principally because such a transaction amounts to maintenance at the common law; and incidentally on the grounds of public policy, and because the discovery could have no effect to enable the plaintiff to maintain any action." The report does not contain the judgments of the peers who took part in the decision, but there is no ground for doubting the correctness of the headnote, and, as Lord Loughborough sat in the case in the House of Lords, it is probable that in dismissing the appeal he proceeded on the same grounds on which in the court below he had allowed the demurrer. It was suggested in the present case that the decision in the House of Lords might have proceeded on some other ground than that of maintenance. There is no other ground on which the judgment could have been given. There was nothing in the point taken by the defendant that the contract was void under the Statute of Frauds as being a promise to answer for the debt of another. On the demurrer the allegations in fact in the bill must, of course, have been accepted for the purpose of the argument, and one of these allegations was that the duke had retained Mr. Wallis, so that there was no question of his being a mere surety. This was a case in which the proceedings maintained had been successful, and it was held all the same that the transaction was illegal on the ground of maintenance. I cannot see how the case can be reconciled with the contention that there is maintenance only where the party maintained has failed in the action or defence. It is a direct decision of the House of Lords the other way, and there is no decision to the contrary.

The same law was laid down by the Court of Appeal in 1913 in the case of *Oram* v. *Hutt*. (1) In both these cases it was decided that the offence of maintenance is constituted although the claim maintained succeeded. No question, of course, arose in these cases as to an action for maintenance, but this does not affect the value of these decisions for the present purpose. They settled what constitutes maintenance, and when that is ascertained, a right of action is conferred on

(1) [1914] 1 Ch. 107.

anyone who sustains damage by the commission of the offence.

In 1895, Lord Esher in the case of *Alabaster* v. *Harness* (1) took precisely the same view of this subject, and said: "The doctrine of maintenance, which appears in the Year Books, and was discussed briefly by Lord Loughborough in *Wallis* v. *Duke of Portland* (2), and more elaborately by Lord Coleridge C.J. in *Bradlaugh* v. *Newdegate* (3), does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful. Lord Loughborough, in *Wallis* v. *Duke of Portland* (2), says that the rule is, 'that parties shall not by their countenance aid the prosecution of suits of any kind, which every person must bring upon his own bottom, and at his own expense.' But the law from the earliest times has countenanced some relaxation of the utmost strictness of that rule; and some particular cases have been specifically allowed as constituting excuses for that interference in the suit of another which would otherwise have amounted to maintenance." The same view was taken by Bray J. in *Scott* v. *National Society for the Prevention of Cruelty to Children.* (4)

An action for maintenance differs essentially from an action for malicious prosecution, which can be maintained only if the prosecution failed. *Metropolitan Bank* v. *Pooley* (5) was governed by considerations analogous to those which apply in actions for malicious prosecution and is not material for the present purpose. It has not, so far as I am aware, ever been suggested that the offence of champerty would not

(1) [1895] 1 Q. B. 342.
(2) 3 Ves. 494.
(3) 11 Q. B D. 1.
(4) 25 Times L. R. 789.
(5) 10 App. Cas. 210.

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be constituted if an agreement had been made to share property to be recovered, however right the claim to that property might be. As Lord Coke says, maintenance is the genus and champerty the species of that genus. It is impossible to suppose that the wrongfulness of the claim maintained was material in the one case and not in the other.

As I have said, maintenance is a common law offence. It is true that various statutes were passed inflicting particular penalties upon various kinds of maintenance. The statutes are 3 Edw. I. c. 28, 28 Edw. I. c. 11, 1 Edw. III. c. 14, 1 Rich. II. c. 4, and 32 Hen. VIII. c. 9. Some of them relate particularly to the abuse of maintenance by the King's officers and to maintenance by false evidence or other sinister means, which would, of course, be an aggravation of the offence, but none of them in any way cut down the common law upon the subject. The latest and most important is 32 Hen. VIII. c. 9. That statute begins by reciting that the administration of the law was greatly "hindered and letted by maintenance, embracery, champerty, subornation of witnesses, sinister labour, buying of titles and pretensed rights of persons not being in possession, whereby great perjury hath ensued, and much inquietness, oppression, vexation, troubles, wrongs and disinheritance hath followed." The statute goes on to provide that all statutes against maintenance, champerty and embracery shall be put into due execution (s. 1). The second section is directed against the purchase or sale of pretensed rights in land unless there has been possession for a year before the sale, with an exception by s. 4 for cases where the purchaser was in lawful possession. Sect. 3 is in the following terms: "And furthermore, That no manner of Person or Persons, of what Estate, Degree or Condition soever he or they be, do hereafter unlawfully maintain, or cause or procure any unlawful Maintenance, in any Action, Demand, Suit or Complaint in any of the King's Courts of the Chancery, the Star-Chamber, Whitehall, or elsewhere within any of the King's Dominions of England or Wales, or the Marches of the same, where any Person or Persons have or hereafter shall have Authority, by Virtue of the King's Commission, Patent or Writ, to hold

Plea of Lands, or to examine, hear or determine any Title of Lands, or any Matter or Witnesses concerning the Title, Right or Interest of any Lands, Tenements or Hereditaments; and that no Person nor Persons, of what estate degree or condition soever he or they be, do hereafter unlawfully retain, for maintenance of any Suit or Plea, any Person or Persons, or embrace any Freeholders or Jurors, or suborn any Witness, by Letters, Rewards, Promises, or by any other sinister Labour or Means, for to Maintain any Matter or Cause, or to the Disturbance or Hindrance of Justice, or to the Procurement or Occasion of any manner of Perjury by false Verdict or otherwise, in any manner of Courts aforesaid, upon pain of Forfeiture for every such Offence x. li. the one moiety thereof unto the King our Sovereign Lord, and the other moiety to him that will sue for the same by Action of Debt, Bill, Plaint or Information in any of the King's Courts; in which action no Essoin, Protection, Wager of Law, nor injunction shall be allowed." It has been urged that the unlawful maintenance mentioned in this section denotes cases in which unfounded claims have been supported, or in which sinister means have been used in their support. I do not think that this is the true meaning of the words. Unlawful maintenance simply denotes the cases in which the justification for the support of another man's action did not exist, such as was offered by motives of charity or relationship.

No inference can be drawn in favour of the respondents' contention from the hard words which occur in some of the indictments or pleadings with regard to maintenance. Such expressions are very common in old pleadings, and when they are used with regard to maintenance they refer not to any injustice in the particular legal proceeding in the course of which the maintenance occurred but to the view of the law that all maintenance, unless in the excepted cases, was unlawful and against public policy.

The respondents' argument on this head in my opinion fails, but as I have said, I am of opinion that the claim for maintenance fails on the short ground that no damage has accrued, and that judgment should therefore be entered upon this head for the defendants.

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VISCOUNT HALDANE. My Lords, as to the appeal brought by Mr. Neville I agree that it fails. I do not, however, think that the case is one where judgment ought to be entered for the respondents. The proper course under the circumstances appears to me to be simply to affirm the judgment of the Court of Appeal in so far as it orders a new trial.

The only question which to my mind presents real difficulty is that which relates to Mr. Neville's claim for damages for maintenance. As to this he obtained a special verdict to the effect that the defendant newspaper company did not act solely or at all from the desire to assist persons to prosecute claims who would not otherwise have been able to enforce their rights, or in the bona fide belief that the persons who sued had a well-founded claim against Mr. Neville. By agreement the amount of damages under this head was left to be dealt with by the Lord Chief Justice, who had tried the case with the jury, and he assessed damages on this claim for maintenance at a sum equal to the amount of the taxed costs which Mr. Neville had been made to pay in the Chancery actions and of his extra costs incurred as between solicitor and client in these actions, as well as of his costs of the consolidated actions. I agree that this verdict was perverse and cannot stand, and I also think that the measure of damages adopted by the learned Lord Chief Justice was wrong. If this were all, a new trial would be the natural result. But by their cross-appeal the newspaper company ask that judgment should be entered in their favour as to this branch of the claim, on the ground that under the circumstances an action could not lie. They point out that the actions for maintenance which they were held to have maintained were adjudged to have been justified, and they say that they were only upholding those who were insisting on the fulfilment of a legal duty on the part of Mr. Neville to pay money due together with the costs of obtaining it. It is argued on the newspaper company's behalf that there was accordingly no damage and that therefore no action for maintenance would lie.

My Lords, the question so raised is one of much difficulty. What the newspaper company did was to publish an offer

in these terms: "In view of the widespread interest taken in the proposal of the South Coast Land and Resort Company to develop New Anzac-on-Sea, and to the fact that many of the winners of so-called consolation prizes are being refused the return of the three guineas paid by them and have written to us on the subject, we are prepared to instruct our solicitors to take proceedings for the recovery of these sums, at our own expense, if those who have paid these sums choose to avail themselves of this opportunity. The 'Daily Express' has taken this matter up from a sense of public duty, and to assist those who hesitated, on the ground of expense, to bring their cases before the Court." They then invite communication with their solicitors. It will be observed that this offer is made not merely to claimants who are poor, but to all claimants irrespective of their means. Did this, and the steps taken on it, amount to maintenance? Various definitions of maintenance are to be found in the authorities. To abstain from it is a duty which the common law recognizes and which has been affirmed also by statutes. Some of the definitions are collected in the judgment of Lord Coleridge C.J. in *Bradlaugh* v. *Newdegate* (1) and also in that of Buckley L.J. in *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.* (2) It is true that the Courts are not to-day disposed to extend the principle, and that various exceptions to or legal excuses for it, such as that resting upon motives of charity, have been introduced. A common interest, speaking generally, may make justifiable that which would otherwise be maintenance. But the common interest must be one of a character which is such that the law recognizes it. Such an interest is held to be possessed when in litigation a master assists his servant, or a servant his master, or help is given to an heir, or a near relative, or to a poor man out of charity, to maintain a right which he might otherwise lose. But in the present case none of these justifications are present, for the case is simply one of a newspaper undertaking to conduct a suit for any reader with a case who may apply to it, whether rich or poor and without distinction of person. Can it be said that this

(1) 11 Q. B. D. 1. (2) [1908] 1 K. B. 1006.

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does not fall within the principle, if it survives at all? I do not think so. For the broad rule remains unrepealed by any statute that it is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence. As to this being the rule all the definitions agree in substance. It is argued that the suits maintained in the present case succeeded, that their justification in law was established, and that this fact takes the case outside the principle forbidding maintenance. It is further argued that Mr. Neville had only to pay the money and costs for which the law declared him liable, and that not only can these not be recovered by him as damages suffered, but that there was no damage at all, and that apart from some damage no suit for maintenance could lie at his instance.

My Lords, as to the measure of damages important questions arise which have to be considered separately, but the first question, that which lies at the root of the controversy, is whether it was necessary to prove actual pecuniary damage as a condition of the right to sue. Now it must be observed that so to hold would be to prevent any one from bringing an action for maintenance until the litigation maintained had been disposed of, and a result definitely ascertained, a process which might take years. But the definition of the duty, as I have given it, not to maintain, appears to me to be wholly inconsistent with this view, and the language of the statutes on the subject seems to me to be not less so. For example, 1 Edw. III., Stat. 2, c. 14, enacts that "because the King desireth that common right be administered to all persons, as well poor as rich, he commandeth and defendeth, that . . . . none . . . . in this land, great nor small, shall take upon them to maintain quarrels nor parties in the country, to the let and disturbance of the common law." Various statutes have made maintenance a criminal offence and have prescribed penalties for that offence. But it is clear from the authorities that, throughout, the breach of this law has been treated as a civil wrong for which damages were recoverable. The only question is, as I have pointed out, whether actual pecuniary damage

arising from the suit having been maintained unjustifiably need be proved.

My Lords, taking the statutes as they stand, and bearing in mind that certain of them annex penalties to a wrong which was already recognized as a wrong by the general law apart from them, what is the proper canon for their construction? What was said by Lord Cairns in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1) is no doubt true. He questioned the broad terms in which the law had been laid down by Lord Campbell C.J. in *Couch* v. *Steel* (2) to the effect that when a statutory duty is created any person who can show that he has sustained injury from the nonperformance of that duty can bring an action for damages. Lord Cairns pointed out that in each case this must turn on the character of the statute, and the intention to be collected from its terms read as a whole. Now the canon of interpretation in these cases is one which is not obscure, however difficult may be its application to particular statutes. It is laid down by Willes J. with the precision which distinguished the utterances of that most accomplished lawyer, in the case of *Wolverhampton New Waterworks Co.* v. *Hawkesford.* (3) "There are three classes of cases in which a liability may be established by statute. There is that class where there is a liability existing at common law, and which is only re-enacted by the statute with a special form of remedy; there, unless the statute contains words necessarily excluding the common-law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it. . . . . With respect to that class it has always been held, that the party must adopt the form of remedy given by the statute."

(1) 2 Ex. D 441.
(2) 3 E. & B. 402.
(3) (1859) 6 C. B. (N. S.) 336, 356; 28 L. J. (C. P.) 242, 246. The quotation is taken from the Law Journal report.

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My Lords, the statute interpreted in the case before Lord Cairns was a plain example of the third of the classes to which Willes J. then refers. But here the statutes enact a liability recognized by the common law, and thereby declare a correlative right. Nothing is said about the civil remedy, nor is the right to protection by the Courts confined to protection from the maintenance of unjustifiable suits. If this be so, the violation of the right imports an injury independent of proof of legal damage.

My Lords, as Lord Holt showed in *Ashby* v. *White* (1), every violation of a right imports damage in contemplation of law. This principle applies whether the right arises out of a contract, as in *Marzetti* v. *Williams* (2), or out of a tort, as in *Embrey* v. *Owen*. (3) The damage may be substantial, but may also amount to what is merely nominal. As Maule J. said in *Beamount* v. *Greathead* (4), "Nominal damages are a mere peg on which to hang costs. . . . . Nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity." As Parke B. observed in *Embrey* v. *Owen* (5), "Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage." He went on to point out that the principle did not apply to the case with which he was dealing, because the right was to the flow of a stream, a right only to the flow subject to its reasonable enjoyment and possible slight diminution by higher riparian owners. The right there was only a qualified one. But where the right is, as it often is, an absolute right the doctrine laid down by Lord Holt in *Ashby* v. *White* (6) applies, and every infringement of such an absolute right gives a claim to nominal damages, even though all actual loss or injury is disproved.

My Lords, I think that the right to protection against maintenance is an absolute one. The statutes say nothing about justification of the suit maintained. The maintenance

(1) 2 Ld. Raym. 938, 955.
(2) (1830) 1 B. & Ad. 415.
(3) (1851) 6 Ex. 353.
(4) (1846) 2 C. B. 494, 499.
(5) 6 Ex. 368.
(6) 2 Ld. Raym. 938.

of any suit is forbidden, and the only excuse which the authorities have recognized is that of a common interest of that defined nature which prevents the act done from coming within the category of maintenance by a stranger. In the present case, if I am right, the excuse does not prevent what was done from being maintenance by a stranger, and it follows from the other conclusions at which I have arrived that Mr. Neville had a right of action against the newspaper company.

But it does not follow that he was entitled to the damages in the shape of costs which the Lord Chief Justice assessed. These were costs in which he was justly condemned for resisting a proper legal claim. The real cause of the expenditure to which he was put was his own improper resistance, and not the mere fact of the actions brought in order to overcome it. He ought to have paid back all the money without compelling resort to proceedings in court. Under these circumstances I think he was entitled to no more than nominal damages for the violation of his right, and that the jury ought to have been directed to this effect. I think that justice will be done if judgment on the claim for maintenance is entered for him for merely nominal damages, unless the jury on a new trial think that exemplary damages should be given. No direction suggesting such damages should be given. But the question is one for the jury on a new trial.

LORD ATKINSON. My Lords, the facts have already been sufficiently stated. Apart from Sir Ernest Pollock's contention to the effect that the respondents were entitled to have a verdict directed for them, both on the plea of fair comment and on the claim for maintenance, I am of opinion that, for the reasons stated in the judgments delivered in the Court of Appeal, the order appealed from directing a new trial was right, and should be affirmed. As the two points so made on behalf of the respondents were argued fully, and as one of them, at least, is of importance in itself, it is, I think, fitting that this House should pronounce an opinion upon them. As to the libel, I think it would have been impossible for the learned Lord Chief Justice to have ruled, as a matter of law, that the

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publications complained of were not reasonably susceptible of a defamatory meaning. They were, in my view, clearly susceptible of such a meaning. If this be so, it is plain that one question of fact at least, must have been left to the jury on the plea of fair comment—namely, whether the comment was, in fact, fair or not, and therefore that a verdict for the respondents could not properly have been directed upon the issues raised upon that plea. The question of the respondents' right to a direction on the claim to recover damages for maintenance, notwithstanding the findings of the jury on the questions left to them, is more difficult. The civil action alleged to have been maintained by the respondents—namely, that instituted in the Court of Chancery and tried before Younger J. (for convenience' sake it may be styled the maintained action), was entirely successful. The appellant was found guilty of fraud and false representation; the contracts impeached were decreed to be rescinded; the sums received by the appellant as the cost of conveyance of the plots allotted to the plaintiffs, the so-called prizewinners, were ordered to be refunded, and the appellant was ordered to pay the costs of the plaintiffs. I use the word "proceedings" throughout this judgment to indicate civil proceedings, as the maintenance of criminal proceedings is not actionable: *Grant* v. *Thompson*. (1) Now the contention of Sir Ernest Pollock on behalf of the respondents resolves itself into this general proposition, that the fact that a maintained action is successful is in itself sufficient to sustain a plea in bar to any action brought to recover damages for the maintenance of the action so maintained. That is the wide and bald proposition he has, in argument, sought to maintain. Unless he succeeded in maintaining it he, as I understood him, frankly admitted that he would not be entitled to have a verdict directed for him in the action for maintenance. In other words he, in effect, contended that, according to modern ideas, maintenance to furnish a cause of action at law must involve the rendering officiously of support or assistance to unsuccessful litigation by one not having in the subject-matter of the same any such

(1) 72 L. T. 264.

interest as the law recognizes. The word "litigation" used in this connection of course includes the defence of legal proceedings as well as the institution of them. With the view of showing the soundness of his contention, Sir Ernest further urged that if the right to sue for maintenance did not depend upon the result of the maintained litigation, the necessary consequence would be that if, for instance, A. should assist and support a creditor in recovering from his debtor the amount of the debt the latter owed, that debtor could, in an action for maintenance brought against A., recover as damages the full amount of the debt he was forced reluctantly to pay, together with all the costs he incurred in dishonestly but unsuccessfully defending himself against a just and lawful claim. A result, similar in kind, he said, would follow if the maintained action had been brought to recover damages for some tort committed by the plaintiff in the action for maintenance. Indeed, the damages awarded to the appellant in the present case by the Chief Justice are measured so as to cover the costs incurred by him in unrighteously and unsuccessfully defending himself in the Chancery suit. I am not at all convinced that in the instances Sir Ernest has chosen by way of illustration the damages properly recoverable in the action for maintenance would necessarily include the debt or damages recovered in the maintained action, together with costs. If it did necessarily include them, that circumstance might, no doubt, afford some support to his general proposition. If, however, the essence of the action of maintenance be the officious intermeddling in and supporting litigation in which the maintainer has no legitimate interest, the invasion of a person's right not to be harried in courts of justice by litigation of this sort, as I think it is, then the debt or damages recovered in the maintained actions would be due as much or more to the fact of the defendant's indebtedness, or to the fact of his guilt of the tort for which the damages are awarded, as to the invasion of his right to be spared from officious litigation. The invasion of this right does not create the liability in either case. It existed independently of it. Where, on the other hand, the maintained

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action fails, matters are wholly different. There the costs incurred by the defendant in defending himself are the direct and unmixed result of the invasion of his right not to be harried by such suits, and are properly recoverable as damages in the action for maintenance. It appears to me that a debt which a debtor is forced by litigation to pay cannot properly be called damages, either in the maintained action, or the action for maintenance, neither can the costs incurred by him in defending himself unsuccessfully against a charge of fraud. I cannot find that, from the Year Books down to the most recent authority, there is, with one doubtful exception, any decision or statement of the law by any Court or judge on the subject of maintenance tending to support the respondents' contention. That exception is to be found in the statement of the law by Lord Abinger C.B. in the case of *Findon* v. *Parker*. (1) That most distinguished judge there said: "The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make." The significance of this statement depends upon the meaning of the words "*they have no right to make.*" Do they apply to the persons maintained, or the persons who maintain these latter? As every person has a right to bring any suit in which he is successful, if it refers to the former, it obviously excludes successful suits or defences, inasmuch as the very fact of success shows that the person who succeeds had a right to bring the action or set up the defence which has been successful, but if it refers to the maintainers, the statement applies whatever may be the result of the maintained action or defence, since maintainers have no right "improperly, and for the purpose of stirring up strife" either to bring an action or to set up a defence, whether it be successful or the contrary. Moreover, it is to be remembered that in this case of *Findon* v. *Parker* (2) in which a maintained defence was made, it neither succeeded nor failed. The trial was abortive, as the jury disagreed upon the

(1) 11 M. & W. 675, 682. (2) Ibid. 675.

issues raised on this defence, and were discharged, and the action of the solicitor to recover his costs from the maintainers of the defence was brought and decided before those issues were determined. The solicitor succeeded, because it was held that the maintainers whom he sued had an interest such as the law recognized in the subject-matter of the litigation in which this defence was set up. Again, the same learned judge, Lord Abinger, in *Prosser* v. *Edmonds* (1) purports to state what is the principle upon which all cases of champerty and maintenance are founded, in words which do not suggest in the slightest degree that the maintenance of litigation which is successful does not furnish a cause of action, while that which is unsuccessful does. In dealing with the assignment of a bare right to litigate he says: "What is this but the purchase of a mere right to recover? It is a rule—not of our law alone, but of that of all countries—that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." That statement of the law has been many times approved of in modern cases, such as *Alabaster* v. *Harness* (2), *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.* (3) If Sir Ernest Pollock be right, Lord Abinger should have qualified his statement of the law by confining it to unsuccessful litigation. As far as I have been able to discover, no learned judge who ever quoted this passage with approval, and they are numerous and distinguished, ever suggested it should be so narrowed. Ancient statutes, eight in number, ranging from the 3 Edw. I. to the 32 Hen. VIII. c. 9, have been cited in argument. The last is possibly the widest in reach and the most instructive. Lord Abinger, in giving judgment in *Prosser* v. *Edmonds* (4), said of it that it was a short and useful statute, consistent with the general policy and principles of courts of

(1) 1 Y. & C. Ex. 481, 497.
(2) [1895] 1 Q. B. 339, 344.
(3) [1908] 1 K. B. 1006.
(4) 1 Y. & C. Ex. 481.

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law and equity. In the case of *Pechell* v. *Watson* (1), which has been many times approved of, it was, according to the headnote of the case, decided that maintenance is at common law a wrongful act, that the several statutes relating to it are merely declaratory of the common law, and that because of this a declaration in a case for maintenance need not charge that the maintenance was committed contra formam statuti. The object to effect which this statute of Hen. VIII. was passed appears from the preamble in s. 1. It is there stated to be that "there is nothing within this realm which conserveth his loving subjects in more quietness, rest, peace and good concord, than the due and just ministration of the laws, and the true and indifferent trials of such titles and issues as have been tried according to the laws of the realm." It is then stated that these things are greatly hindered by maintenance, embracery, champerty, subornation of witnesses, sinistre labour, buying titles, and pretended rights of persons not in possession, whereupon great perjury hath ensued, and much unquietness, oppression, vexacious troubles, wrongs, and disinheritances have followed amongst the King's subjects . . . . to the great hindrance of justice within his realm. Then it is enacted that "for the avoiding of all which misdemeanours . . . . all statutes heretofore made concerning maintenance, champerty and embracery, or any of them now standing and being in full strength and force, shall be put in due execution, according to the tenures and effects of the same statutes."

Sect. 2 deals with the buying or selling of, or bargaining for, any right in land if the seller be not in possession, and by s. 3 it is enacted that no person shall thereafter unlawfully maintain or cause or procure any unlawful maintenance in any action demand or complaint in the King's Courts of Chancery, the Star Chamber, Whitehall, or elsewhere . . . . upon pain of forfeiture for every such offence of a certain sum named. Some argument has been directed to the use in this statute of the word "unlawfully." I think from what is laid down in the cases I am about to refer to, the word is used to denote maintenance by persons who are not influenced by those

(1) 8 M. & W. 691.

motives of charity, nor are possessed of those interests in the subject-matter of the litigation, which justify their interference. The important consideration in relation to the point I am now dealing with is the entire absence from the statute of any distinction between successful and unsuccessful litigation, the reason apparently being that both kinds tend equally to disturb the "quietness, rest, peace, and good concord" of the King's subjects.

I now come to the case of *Wallis* v. *Duke of Portland* (1), which, if properly considered, is in my view crucial upon this point. In the year 1789, one George Jackson was returned as member of Parliament for the Borough of Colchester. A petition was presented against his return by one George Tierney, praying that it might be declared that Jackson was not duly elected, and that he, Tierney, was duly elected member of Parliament for the said Borough. In the Journals of the House of Commons, under date April 6, 1789, the report of the Select Committee appointed, according to the then existing practice, to try this petition, is set out. From this it appears that they determined that Jackson was not duly elected, that Tierney was duly elected, and ought to have been returned as a burgess to serve in the then existing Parliament for the Borough of Colchester. The House then ordered that the determinations of the Committee should be entered on the Journals of the House, and further, that the Deputy Clerk of the Crown should attend the House on the following morning with the last return for the Borough of Colchester, and amend the same by making it a return of George Tierney. Tierney's petition was, therefore, successful in omnibus.

Solicitors named Wallis had conducted this petition on behalf of Tierney. It was alleged by them that they had been employed so to do by the Duke of Portland, at his, the Duke's, expense. This, apparently, the Duke denied. The solicitors delivered their bill of costs both to the Duke and to Tierney, but the bill was not paid. Thereupon the solicitors filed a bill for discovery against the Duke, alleging that without discovery they could not make their demand available at law,

(1) 3 Ves. 494, 500, 502, 503.

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and praying that discovery might be made as to the facts which were set out at length in the bill, and, in effect, whether the plaintiffs had been employed by the Duke as solicitors to present and prosecute the petition on behalf of Tierney. This bill was demurred to, and the demurrer allowed, as stated in the headnote, on the ground of public policy, and because the discovery would have no effect, and principally because such a transaction as that alleged would amount to maintenance at common law. The fact that the petition was determined was stated in the bill, but the result was not stated, as if success or failure were immaterial. At the end of the argument, the Lord Chancellor, Lord Loughborough, said he wished to defer his judgment, not from any doubt that he entertained, but that he might give it more correctly. He proceeded to say that the question happened not to be entirely new to him, and referred to a case which had come before him where the same point was raised. He wound up by saying: "All the law books state the offence of maintenance to be, not upon the statutes, but it is repeatedly said to be malum in se; and those acts, that are acts of maintenance in a suit not subject to particular provisions of the statutes, are punishable by indictment at the King's suit. I do not mean to go farther into the case now." It is clear that in these remarks the point he was dealing with was maintenance. When he came on August 7 to deliver his considered judgment, the point of maintenance is practically the only point considered. In the last paragraph of his judgment he says: "I do not go into the argument, which was very properly urged in support of the demurrer, upon considerations of public policy: because I am of opinion upon the whole of the case, that it is directly stating a transaction of maintenance; praying a discovery of that, which, if the discovery was made, would fall within that specific reprobated offence stated by the common law; that if the discovery was made, it would be malum in se; therefore I am of opinion, it is not fit for a court of equity to permit this suit to proceed any farther. Allow the demurrers with costs."

This passage establishes, I think, that in the opinion of

the Lord Chancellor the employment by one man of a solicitor for reward to prosecute for another a suit in which the employer has no interest such as is recognized by law is a tort amounting to maintenance, is malum in se, and that it is not purged of its illegality by the fact that the suit so presented had been successful. If the respondents' contention were sound—namely, that it is not a tort, not malum in se, to support and maintain litigation which has been successful—the objection to the discovery on which the decision of the Court was based would not have applied.

In an earlier portion of his judgment, Lord Loughborough laid down the law in these words: "The case disclosed is of this nature; an undertaking supposed between the plaintiff and the defendant, that the latter would contribute to the expense of a petition against the return of a member of Parliament in the whole or a given extent. That is an engagement between two parties to the injury and oppression of a third: in short, it is maintenance; for maintenance is not confined to supporting suits at common law. In the first book you open upon the subject (one naturally looks into Hawkins) it is stated to be either in pais or by prosecuting suits. Maintenance in pais is punishable by indictment. Maintenance by prosecuting suits, without distinguishing what suits, is punishable by an action by the party grieved also; and that is an action at common law. Statutes prohibiting particular species of maintenance add penalties: but it is laid down as a fundamental authority, that maintenance is not malum prohibitum, but malum in se: that parties shall not by their countenance aid the prosecution of suits of any kind; which every person must bring upon his own bottom and at his own expence. There is no case in contradiction to this."

Lord Loughborough draws no distinction between successful and unsuccessful suits. It is, in my view, quite inconceivable that he should not have done so if the law recognized any such distinction. This statement of the law by Lord Loughborough is quoted with approval in many modern cases. By Fry L.J. in delivering the judgment of the Court of Appeal on *Harris* v.

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Brisco (1), in which after citing Coke, 2 Inst. 208, Comyns' Digest, Les Termes de la Ley, and *Pechell* v. *Watson* (2), he treats it as clearly established that an action for maintenance lies at common law. Lord Esher in *Alabaster* v. *Harness* (3), after quoting the above extracted passage from Lord Loughborough's judgment, said the doctrine of maintenance "does not appear to me to be founded so much on general principles of right and wrong or of natural justice as upon considerations of public policy. I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful."

If this be so, as I think it is, then this mischief to the public interest is done by the act of affording assistance and support to the litigation irrespective of the result of it. No doubt in modern times many transactions which would formerly have been held to amount to maintenance would not now be so regarded; see *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.* (4); but the general principles of the law remain the same.

The case of *Wallis* v. *Duke of Portland* (5) was brought on appeal to the House of Lords. Lord Coleridge in *Bradlaugh* v. *Newdegate* (6) stated that he had found that Lord Loughborough, Lord Kenyon and Lord Walsingham were present at the hearing of the appeal; that the case is reported in the Supplementary Volume of Brown's Parliamentary Cases, and that it is stated in the headnote that Lord Loughborough's decree was affirmed "principally because such a transaction amounts to maintenance at the common law." It is also reported in Vol. III., House of Lords (English Reports), 508. The judgments, if any, delivered by these noble Lords are not given. In the final paragraph of the report, it is stated

(1) 17 Q. B. D. 504.
(2) 8 M. & W. 691.
(3) [1895] 1 Q. B. 339, 342.
(4) [1908] 1 K. B. 1006.
(5) 8 Bro. P. C. 161, 168.
(6) 11 Q. B. D. 1.

as follows: "In support of the order, and against the appeal, the following short reason was stated in the respondent's printed case. Because the discovery, sought by the bill, appears, from the bill itself, to be neither material nor necessary; and because a court of equity will not aid a plaintiff seeking discovery in a case of maintenance, and in the other circumstances of it such as the plaintiff has stated in his bill. It was accordingly ordered and adjudged that the appeal be dismissed, and that the order therein complained of be affirmed." It is hardly possible, I think, to believe that if the grounds upon which Lord Loughborough had pronounced the judgment appealed from had been disapproved of, some notice of that fact would not have been found in this report, insufficient though it be. In the present case, one is not concerned with the class of cases in which persons, owing to their charitable motives or the interests which they have in the subject-matter of the maintained suits, are held not to be responsible for the maintenance of these suits. It is not contended that the respondents came within that class.

Lord Coleridge in *Bradlaugh* v. *Newdegate* (1) said that it was conceded that, if the House of Lords had not relieved Mr. Bradlaugh of the penalty, he would have been entitled to recover as damages the penalty and all the cost of defending himself. I must say that, with all respect to the defendant's counsel, I think that was a very rash concession. In *Scott* v. *National Society for the Prevention of Cruelty to Children* (2) one Watson, one of the inspectors of the defendants' society, sued a woman named Scott for slander. The action was unsuccessful. Scott had obtained from the justices at Petty Sessions a bastardy order against Watson. On appeal by Watson to the justices at Quarter Sessions that order was quashed. The defendant society undoubtedly supported and maintained Watson on all the proceedings. Scott sued the society for maintenance and claimed the costs she had incurred, as well in obtaining the bastardy order from the justices in Petty Sessions, as in defending herself in the appeal, and also the cost she incurred on the action for slander. Bray J.,

(1) 11 Q. B. D. 1. (2) 25 Times L. R. 789, 791.

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in giving judgment, said: "As to the bastardy proceedings, it was said that as Mrs. Scott failed she could not recover any costs. He thought that the cases showed that it was immaterial what the result might be. It was the wanton intermeddling that was the cause of action. Mr. Manisty did not, however, press his claim for the costs before the justices in Petty Sessions, and, as the facts were not quite clear, he did not propose to give anything in respect of them. But as to the appeal to the justices in Quarter Sessions, the plaintiff's case was clearer . . . . Therefore the plaintiff was entitled to recover her costs between solicitor and client in that appeal."

So far as the direct authorities go, I cannot find a single suggestion to support the respondents' contention as to the effect of success in the maintained action. When *Pechell* v. *Watson* (1) and *Flight* v. *Leman* (2) were decided, it was considered that to procure the commencement of a suit was not maintenance, and hence a count was framed to meet such a case to the effect that the defendant unlawfully and maliciously and without reasonable and probable cause instigated and stirred up A. B. to institute an action against the plaintiff, who sued for damages. And it was held that in analogy to the action for malicious prosecution, the want of an averment of the absence of reasonable and probable cause was fatal. It is no longer the law that procuring the institution of a suit, as distinguished from supporting one already commenced, may not amount to maintenance: *Hutley* v. *Hutley* (3); *Sprye* v. *Porter*. (4) The absence or presence of probable cause that the litigation is well founded is obviously immaterial if accomplished success is immaterial. There is no analogy between this action of maintenance and an action for malicious prosecution, because every person acting on behalf of the Sovereign, as all prosecutors in effect do, is justified, in the interests of society, in putting the criminal law in motion if he does so without malice and with reasonable and probable cause. There is, in such a case, no officious intermeddling in litigation that does not concern the meddler. See *Grant* v. *Thompson*. (5)

(1) 8 M. & W. 691.
(2) 4 Q. B. 883.
(3) (1873) L. R. 8 Q. B. 112.
(4) (1856) 7 E. & B. 58, 81.
(5) 72 L. T. 264.

The statute 32 Hen. VIII. c. 9 does not expressly or impliedly take away the right to sue for the tort of maintenance in a common law action on the case, though it turns the tort into a crime and imposes a penalty on the commission of the crime. The case then would seem to fall within the first or, if not, the second of the three classes mentioned by Willes J. in his judgment (*Wolverhampton New Waterworks Co.* v. *Hawkesford* (1)), namely, the class (1.) where there was liability existing at common law, and that liability is affirmed by a statute, which gives a special and peculiar form of remedy different from the remedy which existed at common law. There, unless the statute contains words which expressly exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy.

What then is the nature of the common law action brought for the tort of maintenance? Is it one in which damage is the essence of the action, as in an action, for instance, for personal injuries through the negligence of the defendant? Or is it one, like actions for trespass, assault or libel, or such as the action in *Ashby* v. *White* (2), in which the mere invasion of the plaintiff's legal right imports damage and is sufficient to maintain the action? In my view it is of the latter class. I think the authorities show that every subject has a legal right not to be harried in courts of justice by actions such as I have mentioned, brought by officious intermeddlers who have no legitimate interest in their subject-matter. The following passage from the judgment of Holt C.J. in *Ashby* v. *White* (2) is, I think, directly in point. He said: "My brother Powell indeed thinks, that an action upon the case is not maintainable, because there is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man

(1) 6 C. B. (N. S.) 336, 356. (2) 1 Sm. L. C. (12th ed.) 266, 288.

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gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man will have an action against another for riding over his ground, though it do him no damage: for it is an invasion of his property." In the present case the legal right of the plaintiff of the kind described was invaded by the respondents' action. The success in the maintained action, even if it affected the damages, could not, in my view, absolutely bar his right to recover nominal damages for that invasion. As at present advised, I do not think the appellant was entitled to recover as damages for maintenance the amount of the costs incurred by him in the maintained action. I think he was only entitled to recover nominal damages.

The appellant's contention, therefore, in my opinion fails. The appeal and cross-appeal should, in my opinion, therefore be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, in these cross-appeals two questions are raised. The first is whether the defendants are entitled to a new trial in that part of Mr. Neville's action under which damages were asked against the respondents in respect of libel. Upon this I have nothing to add to what has been said from the Woolsack, and I respectfully agree therewith.

The second question arises upon that head of the action under which damages are claimed in respect of maintenance. Upon this question my opinion is that, in circumstances such as have occurred in this case, such an action fails. It is in my view not warranted by the doctrines of the English common law, and it appears to me to be beyond all question contrary to its spirit. In view of the judgments of the Courts below, and of the great respect due to the learned judges there, those doctrines and that spirit demand a careful examination.

The circumstances stand clear. Mr. Neville, a speculator in land, bought a section of ground on the Sussex shore, and he conceived the scheme, or dream, of turning it into a seaside resort. He induced a large number of persons to take from him,

as prizes won by them, plots of the ground which were represented each to be worth about 50*l.*—the land to be got for nothing but a payment of three guineas to be made, which payment was held out to be the fee for the legal conveyance. A crowd of people read his advertisements and fell into his trap. The "Daily Express" newspaper exposed the transaction and brought upon itself in doing so this action for libel which is to be retried. It also undertook to assist the people who had been entrapped to get their bargains rescinded and their money back.

One hundred and twenty-five persons accepted this assistance. Writs were issued in Chancery on their behalf, in which they repudiated the bargains and claimed refund of the monies paid. The basis of the repudiation and demand was that the appellant had been guilty of fraud. Nine of those cases were selected as a test, and they went to trial.

The actions were successful; fraud was established. The language of the declaration of Younger J. was: "This Court doth declare that the plaintiffs in each action were respectively induced to enter into the contracts in the pleadings mentioned with the defendant by his fraudulent misrepresentations." This judgment stands: it was not appealed from; it is not impeached; and it is an outstanding circumstance of the present case that it is not alleged nor suggested that that judgment was reached on any erroneous ground either of law or of fact. The actions were maintained for the plaintiffs by the respondents against Mr. Neville. The result was that justice was done, injustice was defeated, and by the aid of the maintenance given the law was put in force to achieve right, and right was achieved. In my opinion it is no part of the common law of England to make it possible to construct out of this maintenance either a wrong in itself or a wrong sounding in damages.

The learned judges in the courts below have, however, deferred to the view that this is possible. This has made an independent examination of the statutes and authorities necessary.

By 3 Edw. I. c. 25, passed in the year 1275, it was provided

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that "no officer of the King by themselves, nor by other, shall maintain pleas, suits or matters hanging in the King's courts, for lands, tenements, or other things, for to have part or profit thereof by covenant made between them; and he that doth, shall be punished at the King's pleasure."

This enactment is plainly directed against a pactum de quota litis, against champerty and nothing else, and that on the part or behalf of the King's officers.

The first real reference to maintenance as such does, however, occur in the statutes of this Parliament. It is in chapter 28, and is as follows: "And that no clerk of any justicer, or sheriff, take part in any quarrels of matters depending in the King's court, nor shall work any fraud, whereby common right may be delayed or disturbed; and if any so do, he shall be punished by the pain aforesaid, or more grievously, if the trespass do so require."

It is true that the maintenance here condemned is maintenance by the King's officers: but it is, in my opinion, not without importance to observe that even with regard to them, and so early as the thirteenth century, the ratio of such legislation and the essential quality of the practice condemned—that quality without which no offence can be constituted—are expressed in this: "whereby common right may be delayed or disturbed." I think, my Lords, that this quality is vital. It was vital then, and in my opinion it is after six centuries vital still.

By 28 Edw. I. c. 11, passed in the year 1300, it is provided: "And further, because the King hath heretofore ordained by statute, that none of his ministers shall take no plea for maintenance, by which statute other officers were not bounden before this time; the King will, that no officer nor any other, for to have part of the thing in plea, shall not take upon him the business that is in suit." This was again a statute directed against the pactum de quota litis—against champerty, and does not affect the doctrine of maintenance as such.

By the 33 of Edw. I., passed in the year 1305, an Ordinance was made against conspirators: "Conspirators be they that do confeder or bind themselves by oath, covenant, or other

alliance, that everyone of them shall aid and bear the other falsely and maliciously to indite, or cause to indite, or falsely to move or maintain pleas." Up to this point the essential quality of the contravention is falsehood and malice, that is to say, the malice of the maintainer and the falsehood of the plea. But the "conspirators" also include others, namely, "such as retain men in the country with liveries or fees for to maintain their malicious enterprises, and to drown the truth; and this extendeth as well to the takers as to the givers; and stewards and bailiffs of great lords, which by their seignory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves."

I think, my Lords, that the error which appears occasionally in the treatment of this subject finds its origin here. The later part of this Ordinance taken by itself would appear to strike—in the case of maintenance by the servants or retainers of great lords—at maintenance by them as such. It appears to me on the contrary that the Ordinance must be read as a whole; and if it be so read it is in line with what has preceded it on the Statute Book; the essential quality of the illegality is set forth, and that quality must be present—namely, that those charged were maintaining "their malicious enterprises" and *to drown the truth*. Whether this last phrase has escaped certain later authorities or not I do not know, and it is notable that the words themselves only appear in a footnote in the Revised Statutes. But there was no reason for this omission from the main text. For the original of the statute contains quite plainly the vital words "et pur verite esteindre." The attempt accordingly to divorce the act of maintenance from its quality of "drowning the truth," or in the language of the earlier Acts something "whereby common right may be delayed or disturbed," is to turn an act which may be promotive of justice, and a righteous act, into something wrongful and penal, that is to say is to upset the foundations on which the Ordinance is based.

This view is strongly confirmed by the language of the statute 1 Edw. III. c. 14, passed a quarter of a century

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afterwards—namely, in 1326-7. "Because the King," says the Act, "desireth that common right be administered to all persons, as well poor as rich; he commandeth and defendeth, that none of his counsellors, nor of his house, nor none other of his ministers, nor no great man of the realm, by himself, nor by other, by sending of letters, nor otherwise, nor none other in this land, great nor small, shall take upon them to maintain quarrels nor parties in the country, to the let and disturbance of the common law." What in short is to be accomplished is the impartial administration to poor and rich alike, and what alone prohibited is maintenance of "quarrels and parties" "to the let and disturbance of the common law."

Then comes fifty years afterwards—namely, in 1377, chapter 4 of 1 Rich. II. It deals with penalties, and it is prefaced undoubtedly with prohibitive language thus: "It is ordained and established, and the King our lord straitly commandeth, that none of his counsellors, officers, or servants, nor any other person within our realm of England, of whatsoever estate or condition they be, shall from henceforth take nor sustain any quarrel by maintenance in the country, nor elsewhere, upon a grievous pain": the pain upon the King's officers to be ordained by him, other officers to lose their services, other persons to be imprisoned and so on. I have very considerable doubt whether the intendment of this statute was the maintenance of suits of law. Primarily it was directed to promoting the civil peace in the country districts or elsewhere, and preventing the spreading of embroilments destructive of public order. This doubt is not resolved by the inclusion of this Act among the statutes which are confirmed by the 15th of 7 Rich. II. (1383), which bears to be "for the grievous complaint that is made of maintainers of quarrels, and champertors." This doubt is confirmed, and in my opinion a point of much obscurity and difficulty is set at rest by the statute of Hen. VIII. to which I am about to refer.

The statute was passed in the year 1540, and is the 32 of Hen. VIII. chapter 9. It deals specifically with legal administration and with the various forms in which that may be

impeded or distorted to evil ends. In the preamble, or rather in s. 1, this is made clear. The King calls to his remembrance that "there is nothing within this realme that conserveth his loving subjects in more quietness rest peace and good concorde than the due and juste ministration of his lawes, and the true and indifferent triall of suche titles and issues as ben to be tried according to the lawes of this realme, which his most roiall Majestie perceyveth to be gretely hindered and lettid by mayntenance embracerie champertie subornation of witnesses sinistre labour buying of titles and pretensed rights of personnes not being in possession, wheruppon greate perjury hathe ensued, and muche unquietnes oppression vexacion troubles wrongis and dishenheritaunce hath followed amongest his most loving subjects, to the greate displeasure of Almighty God the discontentacion of his Majestie and to the greate hinderaunce and lett of justice within this his realme."

The third section of the Act provides that no person "doo herafter unlaufully maineteyn or cause or procure any unlaufull mayntenance in any action demaunde sute or complainte in anny of the Kings Courts" . . . . and also that no person "doo herafter unlaufully reteigne, for maintenance of any sute or plea, any persone . . . . or embrace any freholders or jurours, or suborne any witnes . . . . for to maineteigne any matier or cause, or to the distourbance or hinderaunce of justice, or to the procurement or occasion of any maner of perjury by false verdict, or otherwise in any maner of Court aforesaid."

My Lords, I have seen occasion to point out that these statutes from the thirteenth century onwards do not condemn maintenance of suits as such, but they do condemn and alone condemn such maintenance of suits as is to the delaying or disturbing, the hindrance or denial of justice, and that accordingly to bring within their range a maintenance which is and may be clearly and demonstrably shown to be promotive of justice and in support of right is an erroneous construction.

This last cited Act supplements and confirms and in my view gives plain Parliamentary sanction to what appears to me to be the more reasonable and sensible and sound view.

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What is aimed at is the just and due administration of the laws. The maintenance which has displeased God and made the King and his subjects discontented is the maintenance which is to the great hindrance and let of justice. And it is this sort of thing, and no other maintenance, which is struck at by s. 3; unlawful maintenance, procuring any unlawful maintenance, unlawful retaining for maintenance or getting a false verdict through perjury or similar nefarious means.

I ask myself what is the use of all this language about "unlawful" maintenance if by the common law of England all maintenance was in itself unlawful. The laws are directed against robbery, arson, theft, or murder: how curious would be the language if it were directed against unlawful robbery, unlawful arson, unlawful theft, unlawful murder. If maintenance were unlawful in itself, the law would, one would have thought, have prohibited it simpliciter; and the simple truth as I view it, and as I think the Legislature viewed it, is that that maintenance alone is unlawful which is to the delaying, the interference with, the distortion or the prevention of justice in the courts of the realm.

The attempted answer to this appears to be that when these statutes were enacted or put into force the common law of England had already made exceptions, and that it was only the cases that did not fall within the exceptions that were unlawful. This brings me to examine the institutional writers referred to. Commenting on the 25th of the first Parliament of Westminster—against champerty—Coke in the Second Part of his Institutes, p. 208, observes that Bracton, who wrote before its date, rehearsing the articles enquirable by the justices in Eyre, speaks of the sustaining by a champerter "per quod justitia et veritas occultetur." He adds: "and Fleta agreeth with him, where it is said, per quod justitia et veritas occultetur; it appeareth that the end of champerty and maintenance is to suppresse justice and truth, or at least to work delay, and therefore it is malum in se, and against the common law." In a further paragraph he says: "An action of maintenance did lie at the common law, and if maintenance

in genere was against the common law, a fortiori champerty, for that of all maintenances is the worst."

Commenting further upon the 28th of this Parliament, against maintenance, it is in my view nowhere to be found that Coke places maintenance on a different foundation or describes it as having any wider scope under the common law than it had simply under this statute where it was described as something "whereby common right may be delayed or disturbed." Coke puts the matter thus: "Maintenance is an unlawfull upholding of the demandant or plaintife, tenant or defendant in a cause. . . . . This maintenance (as hath been said) is malum in se, and against the common law, and that is notably proved by this Act, for hereby maintenance is branded with this quality that thereby common right is delaied, or disturbed, and consequently against the common law."

So far, in short, as Coke is concerned he appears to give no countenance to the proposition that a maintenance which, say, assists or promotes or procures justice would fall within that "unlawful" maintenance which is struck at. Nor does it support the condemnation of all and every maintenance as "unlawful." On the contrary Coke appears to treat that maintenance and that alone as unlawful which is branded with the quality of delaying or disturbing common right. And it must in conclusion be added that Coke does not deal with the general question of maintenance at all. His observations are and are alone upon statutes affecting officers of the King or of the Courts, and even with regard to them they are of the guarded character described. So far Coke.

Blackstone says of the offence of maintenance that it is "an officious intermeddling in a suit that no way belongs to one." . . . . "This," he says, "is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. . . . . A man may however maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity."

Here is, in this last sentence, what in other treatises and

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text-books is called the list of exceptions, but which upon examination are not exceptions to officious interference, but are defences to it. As Hawkins (I. 456) treats it, it is "in what respects some acts of this kind may be justified." A man may be as officious as he likes in assisting his sons or other kinsmen, or in helping the poor in their litigations. These litigations may even tend to turning the law into an oppression; but yet he will have a defence for his action if his conduct sprang from kinship, service, charity or compassion. But this defence throws no light upon the question whether an interference which is not officious, and does not pervert the law into an engine of oppression, but on the contrary helps the law to be an instrument of justice—whether such an interference could ever be construed as an offence or fall within the denomination of "unlawful."

The search in Hawkins' Pleas of the Crown would yield a rich reward to those who inquired as to the extraordinary lengths to which in certain ages, and by certain authors, the doctrine of maintenance was carried. As, for instance, this: Maintainers, it is said, include all such as assisted "by opening the evidence to the jury; or by giving evidence officiously without being called upon to do it; or by speaking in the cause as one of the counsel with the party; or by retaining an attorney for him; or perhaps by barely going along with him to inquire for a person learned in the law." It was as if law courts were a plague-ridden or infected area, to help another into which was an injury and a crime. Needless to say, these things, once claimed as being part of the common law of England, have long since disappeared. They are repugnant to sensible and modern ideas. What remains of the doctrine deserves, in these circumstances, a scrupulous examination; and I am of opinion that the test of maintenance is the test of the quality of the act itself as it bears upon the attainment of justice in the particular case, and that the test either of tort or of offence is primarily whether it contains that quality which is essential both by the statute and the common law of England.

Everything, in short, which Hawkins opines must, in my

view, be governed by his major definition. "Maintenance," he says, "is commonly taken in an ill sense, and, in general, seemeth to signify an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hinderance of common right." And I cannot but think that Hawkins' statement 1, 27, 43, "that it is not material, whether the plaintiff . . . . were non-suited, or recovered in the action," must be subject to the same qualification—namely, that it was to the disturbance and hindrance of common right. But upon that topic I content myself with referring to and adopting the judgment of my noble and learned friend, Lord Phillimore.

Finally, Hawkins considers the general point, "how far offences of this kind are restrained by the common law." And of this he says: "It seemeth, that all maintenance is strictly prohibited by the common law, as having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits, which perhaps they would not venture to go on in upon their own bottoms; and therefore it is said, that all offenders of this kind are not only liable to (*a*) an action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also that they may be (*b*) indicted as offenders against public justice."

This is a civil suit. I am of opinion, my Lords, that in any civil action in respect of maintenance it is necessary to establish these two things—namely, (1.) that the maintenance was unlawful in the sense above described both in statutes and in text-books; that is to say, that it was to the hindrance or disturbance of common right, to the delay or distortion or withholding of justice; and (2.) that the plaintiff in an action of maintenance shall have suffered actual injury by reason thereof, for which injury alone and to the extent of it is the maintenance answerable.

Having so concluded from an examination of the ancient statutes and law, I ask myself next—what was the practice of the Courts of England? Did they treat, did they hold as relevant, an action or indictment which libelled maintenance as such, as either a tort or a crime? So far as I can ascertain,

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they did nothing of the kind. A curious instance comes to my hand. In 1592-94 William West of the Inner Temple published his "Symboleographie, which may be termed the art, or description, of instruments and presidents." The book had a great vogue; edition after edition appeared; that from which I quote was issued in 1647—this last being in the opinion of a biographer probably issued by his sons. In short, it appears that here was an exhaustive book of practice of the law of England from the end of the sixteenth to at least the middle of the seventeenth centuries. It gives examples, a form of indictment against a barretor, another against a champertor, and lastly against a maintainer. That, however, against the maintainer is grounded upon the 32nd of Hen. VIII., which is cited fully. The style is headed: "For maintenance upon the Statute of Anno 31 Hen. 8 against one maintaining in an action of debt." The citation from the Act being made, the form proceeds, "nevertheless T. L. little pondering (minime ponderans) the foresaid Statute maintained and sustained a certain action which was in the court of our lady the Queen between a certain R. B. plaintiff and a certain T. D. for a plea of debt by the said R. B. versus the said T. D. to the manifest retardation and disturbance of justice and in contempt of our lady the present Queen and to the serious loss of the aforesaid T. D. and contrary to the said Act."

If, my Lords, by the Common Law of England maintenance of suits was by itself either an offence against the law or was by itself a tort, then it appears to me to be inconceivable that a style of indictment in this form could have been formed. Presumably it was composed as expressing a statement of the elements relevant and necessary to the action of maintenance. If maintenance was per se unlawful what more was necessary than to libel the fact, and to state that thereby the law per the statute had been broken. This is not the style, and one asks and sees plainly from it wherein the gravamen of the offence or tort consists. What was it that had been done unlawfully, what was it that was in contempt of the Queen? It was that an action of debt had been maintained with these two essential qualities: (1.) "to the manifest retarda-

tion and disturbance of justice; and (2.) to the serious loss of the foresaid" plaintiff. This last expression ("grave damnum") in my humble opinion excludes the idea of merely nominal damages; the damages must be real and actual.

As has been seen, this is the kernel of the whole matter, and these two essentials the common law of England has, in my opinion, never abandoned.

It, therefore, follows that where the action maintained has succeeded, no suit for damages can lie by the party against whom the action was maintained. Justice was not denied: it was done: the cause maintained was won at law: how can a man in a court of law be heard to say that thereby he was wronged? If under the common law of England such a right existed, then in my opinion the books would have shown many such. Rich crops of litigation might have remained to litigants, including fraudulent and dishonest litigants, who had most justly lost their causes, for damages against those who had helped to that end by maintaining, from wholly disinterested motives and with entire success, the cause of just dealing between man and man. And no doubt Parliament would long ago have taken some action in the matter. There is no such rich crop, nor any.

Much reliance was not unnaturally placed upon what, in my opinion, is the only decided case in which the fact of the success of the process maintained was brought forward. It is *Wallis* v. *Duke of Portland.* (1) The Duke was said to have agreed with the solicitor for Mr. Tierney to support him with funds for contesting a Mr. Jackson's election for Colchester and declaring that the seat was won by Mr. Tierney. The petition succeeded. Tierney was declared elected: but upon the solicitor presenting his bill to the Duke, the latter refused payment. The solicitor sued, and the point before the Court of Chancery was as to a discovery of documents. In the course of the argument by the Attorney-General, Mansfield, four points at least were taken by way of demurrer which may be shortly put as (1.) nothing calling for answer; (2.) a step in a maintenance suit, therefore to be refused; (3.) against a Standing

(1) 3 Ves. 494.

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Order of House of Commons; and (4.) no writing by the Duke. In the Court of Chancery, Lord Loughborough (Lord Chancellor) upheld the second point—namely, maintenance—and opined that maintenance was malum in se. The case went to the House of Lords, and the appeal failed: but there is no record of any pronouncement by their Lordships as to the grounds of judgment. I am humbly of opinion, that this authority—a point of discovery in an action by a solicitor against an alleged client who was a party to an election petition—does not cover an ordinary action for maintenance by an unsuccessful suitor against the maintainer of a successful suitor.

It is notable that the cases cited by Bullen and Leake on this topic are *Flight* v. *Leman* (1) and *Pechell* v. *Watson*. (2) But in each of these cases the fact was that the plaintiff (maintained) had been nonsuited. The former case was raised in order to recoup the plaintiff for the costs to which he had been put by resisting the suit—which costs he could not recover from his former antagonist. The allegation was that the defendant had "unlawfully, maliciously and without probable cause" stirred up and maintained. In short, it was for recovery of costs against the veritable dominus litis.

So was *Flight* v. *Leman*. (3) But there, although the action maintained had also failed, a suit against the maintainer failed on the further and express ground that it did not contain an allegation of want of reasonable or probable cause on the part of the maintainer. Such a case it was held—by Patteson and Coleridge JJ.—was "in strict analogy with actions for malicious prosecution or arrest."

In short, these cases, if they bear on the question of any liability on the part of the maintainer of a good and a successful suit, bear in a negative direction. They form no support whatever for such liability.

Nor, my Lords, does *Bradlaugh* v. *Newdegate*. (4) The attempt to make Mr. Bradlaugh liable in penalties for having voted in the House of Commons without having taken the Oath failed, and accordingly the judgment of Lord Coleridge C.J.

(1) 4 Q. B. 883.
(2) 8 M. & W. 691.
(3) 4 Q. B. 883, 889.
(4) 11 Q. B. D. 1, 10.

was pronounced against the maintainer of a suit which had been held by your Lordships' House to be without legal warrant. In these circumstances, the judgment is substantially occupied with two considerations—namely, whether maintenance in any circumstances (for the competency of any suit for maintenance was broadly challenged) can ground an action of damages; and secondly, were the facts of the case such as to enable him to answer the point of casuistry as he did—namely, that "to do what is illegal is legally immoral, and that a motive which impels to an illegal act is legally a bad motive"? He reached the conclusion that "in this sense" Mr. Newdegate's conduct was immoral and his motive bad.

It is no part of my judgment in the present case that in no circumstances can an action of damages in respect of maintenance lie. Nor does the second point arise here, for the cause maintained was not illegal but was won: and it would have been interesting to see whether the learned judge would, upon the same reasoning, have felt forced to the conclusion that had the litigation reached a different end and the cause succeeded, the motive of the maintainer would have been held to be good. One may conjecture what would have been his view upon that and upon the actual question for decision in the present case by the warm approval with which he cites the words of Lord Abinger in *Findon* v. *Parker* (1), and the adoption thereof by Blackburn J. in *Hutley* v. *Hutley*. (2) These words are well known: "The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make." In my opinion that is still the law of England. This is unquestionably not one of those cases. Not only had the plaintiffs a right to bring their actions, but they succeeded therein, and no Court can question this outstanding and vital fact.

The same view was, I think, entertained by Wills J. in *Harris* v. *Brisco* (3), in which he held that the maintainer should

(1) 11 M. & W. 675, 682. (2) L. R. 8 Q. B. 112.
(3) 17 Q. B. D. 504, 506.

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"have some sort of reasonable ground for his interference" where he has no legal interest, or "some reasonable ground for his belief that he is furthering the cause of justice." The Court of Appeal in no way questioned this, but the reversal in the course of which the valuable citation of authorities was made by Fry L.J. was put on the ground that the case was one of charity, and that howsoever unreasonable it might have been the maintenance being done out of charity could not be made a ground of action.

I have nothing to add to the review of the recent case of *Oram* v. *Hutt* (1) and to the conclusion thereon of my noble and learned friend Lord Phillimore.

But I submit to your Lordships that light is derivable upon the present question from the views expressed in this House in *Metropolitan Bank* v. *Pooley* (2), and in particular from the opinion of Earl Selborne, upon a point which has been far too little attended to—namely, the broad and conclusive effect of decisions of Courts of law on the merits of the root question—namely, the rights or wrongs of the legal proceeding which was maintained. My Lords, upon the other view a maintainer,—however highminded he be, or however prompted by a sense of justice or a reprobation of deceit, and however successful he be in having justice done and deceit exposed,—such a maintainer is civilly responsible in damages for what he has done and furthermore he is a criminal offender. To my mind it is fairly clear that such a doctrine is as morally reprehensible as it is legally indefensible, and, as I have said, I do not think it ever was the law of England. Lord Selborne furnishes two striking illustrations of the sort of principle to be applied. He cites the two cases of malicious prosecution and of a petition of bankruptcy. In such cases what if the prosecution or petition succeeds? Could any responsibility under either the civil or criminal law attach in respect thereof? "An action for malicious prosecution" (3), said he, "cannot be maintained until the result of the prosecution has shewn that there was no ground for it. If a man has been tried and convicted on that

(1) [1914] 1 Ch. 98. (2) 10 App. Cas. 210.
(3) Ibid. 216.

prosecution, and there is no writ of error brought and no reversal of the decision, such an action will not lie. And it is manifestly a matter of high public policy that it should be so." Then dealing with the action of the bankrupt for maintenance against the supporter of bankruptcy proceedings his Lordship added: "The adjudication stands; and even if he had never litigated or disputed it, the fact of its standing would be a sufficient answer to this alleged cause of action." My Lords, I think the very same principle—embedded in the law of England and going far to explain the reiterated reference to those qualities which make maintenance "unlawful"—namely, that the proceedings maintained were in delay and defeat of justice—that same principle applies to the present case. The proceedings against the appellant failed, and justice was done, his frauds were exposed, the monies obtained by him had to be repaid; all this is concluded definitely by law; and this in my opinion is a sufficient and instant answer to the appellant's claim, a sufficient and instant negation that the maintainer was either civilly or criminally a wrongdoer.

The ground of the action thus fails. But upon the further point as to whether a suit might lie for merely nominal damages my opinion is in the negative. I entirely agree with the judgment upon that topic of my noble and learned friends the Lord Chancellor and Lord Phillimore. In my opinion, for the reasons given on the authorities cited, the damages in all cases of maintenance are only such as are answerable to the wrong caused by the maintenance and thereby suffered by the plaintiff. Where accordingly it is ab ante demonstrable that no actual wrong has been caused or suffered an action thus necessarily for only nominal damages for maintenance will not lie. This demonstration is, in my opinion, afforded by the successful result of the suit alleged to have been maintained.

My Lords, my view on the whole case is accordingly that quoad the libel portion of the action a new trial should be granted, and quoad the maintenance portion the suit should be dismissed.

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LORD PHILLIMORE. My Lords, I agree that so far as the plaintiff's claim for damages for libel is concerned the order of the Court of Appeal should be affirmed.

The verdict for 300*l.* damages on this head which the plaintiff obtained cannot stand for, as I think, three main reasons :—

1. The statement of claim, which took an unusual form, inserted in a schedule some fifteen articles in the "Daily Express" and in the body of the claim stated the sting and point of the libels to consist in that the plaintiff was carrying on a fraudulent and dishonest business and was obtaining money and had in fact obtained large sums from divers members of the guileless and thrifty public by deception and false pretences and had thereby been guilty of a criminal offence. It is true that this allegation is in form an innuendo and that in actions for libel the plaintiff is not tied to the meaning which he attributes by his innuendo, but may succeed if the words in their natural sense are defamatory, and it is further true that there is much defamation in the newspaper articles, and hence it may be said that even if the defamation to which the innuendo points has been justified, there is other defamatory matter which has not been justified. This is a reason for not deciding the case absolutely against the plaintiff, but allowing him a new trial. But so much importance was attached in the trial to the question of the business and its conduct that if the defamation to which the innuendo points was justified the rest was subsidiary and could afford no reasonable ground for giving to a plaintiff whose character in business was so bad such a large sum by way of damages.

2. Because the Lord Chief Justice who tried this case with great patience and addressed himself to it in his summing up with a great mastery of all the details and their business effect has reported that he was dissatisfied with the verdict.

3. Because in the other part of the case upon the claim for maintenance the jury returned an answer which was so entirely unsupported by the evidence, so grotesquely wrong, as to show that the jury had not dealt with the case in a judicial temper, and to make the result of the trial unsatisfactory.

Therefore I am of opinion that the verdict on this part of the case cannot stand.

The defendant company has lodged a cross-appeal to your Lordships' House, and counsel for it have asked that as to this part of the case there should not be a further trial, but that judgment should be entered for it. But this cannot be.

In the fifteen articles published by the "Daily Express" there is admittedly a vast amount of defamatory matter which the defendant company has undertaken to justify. It is for the jury to say whether this justification is proved, and the only circumstance which would warrant withdrawing the case from the jury would be the plaintiff's admission of the facts upon which the defamatory statements were rested. He did admit many damning facts, but it would be impossible to extract from his admissions enough to cover all the charges contained in the newspaper articles, and it will be for the jury to say whether so much as he did not admit was, or was not, proved. Therefore the case, so far as the libel is concerned, must stand for a new trial.

Now, my Lords, I come to the question of maintenance. Here, as I have already indicated, the jury gave an answer which was unsatisfactory, and there should be, therefore, at least a new trial. Let me explain. There were a number of persons who complained that they had been induced to part with a sum of three guineas upon the representation made by Neville that each had won a piece of land as a prize, and that the three guineas was the cost of the necessary deed of conveyance of the prize; whereas in truth the cost of the conveyance was only a few shillings, or even pence, and the balance represented more than double the price of the land which they were told was given them gratis as a prize. The "Daily Express" Company no doubt encouraged these people to bring actions to recover their money. It collected them, it instructed solicitors and counsel for them, and it made itself responsible for the costs. In legal language it maintained the action.

The questions which the Lord Chief Justice left to the jury were directed towards the ascertainment of the motives which induced the defendant company to maintain this action.

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Question 4 was as follows: "Did the defendants act from the desire to assist persons to prosecute claims who would not otherwise have been able to enforce their rights?"

Question 5: "Did the defendants act in the bona fide belief that the persons who sued had a well-founded claim against Neville?"

Upon reflection it will be seen that in the order of thought question 5 comes before question 4; this is in fact a component part of question 4, and if 5 is answered in the negative, 4 must equally be so answered.

Now the jury answered 5 in the negative. This, speaking with all respect to the jury, is absurd. The case for the several purchasers was, as I have said, based upon fraud committed by Neville. It came on for trial before Younger J. Thereupon counsel for Neville offered to pay the several sums claimed in full and the costs so as to avoid a formal inquiry into his alleged frauds.

Counsel for the purchasers refused this offer, and insisted upon proceeding to prove his case, and the judge accepted his contention. Whether this was right or wrong does not much matter, but I agree with the Master of the Rolls that there was sufficient reason for proceeding with the trial. Thereupon Neville instructed his counsel to withdraw from the case; the trial proceeded, the fraud was proved to the satisfaction of the judge. Judgment was entered against Neville on the ground of fraud, and there was no appeal.

It was not suggested that this judgment came as a surprise to those who represented the newspaper, or that they were unaware beforehand of the facts which proved the fraud. In these circumstances it was absurd to say that the defendant company, through its servants, had not an honest belief that the plaintiffs in the Chancery action had a righteous case. The verdict, therefore, upon this head cannot stand, and the least that could be done was to order a new trial.

But the defendant company has, upon its cross-appeal, asked your Lordships' House to do more for it, and to enter judgment for it as to this part of the case, upon the ground that on the admitted facts no action for maintenance could lie.

Your Lordships have had an interesting and far-reaching argument upon this point, and I trust that the result of your Lordships' decision will be the clearing up of a somewhat obscure portion of our law.

The Court of Appeal made short work of this point. The learned Lords Justices thought that they were concluded by the decision in *Oram* v. *Hutt.* (1) But an analysis of that decision will show that it is only of value for one link in the chain of reasoning which should decide the present case.

The outline of the facts which led to that decision is as follows: One McNicholas spoke slanderous words of Johnson, the General Secretary, and Dewis, a Lodge Secretary, of a Trades Union. These slanders reflected not only upon the individuals but upon the management of the Union, and were considered to be likely to damage its interests. Accordingly those in authority for the Union resolved that it was expedient that actions for slander should be brought by Johnson and Dewis and that the Union should support them in the matter of costs.

The actions were brought and were successful, but the costs were heavy, and Johnson, who was a man of straw, could pay neither damages nor costs. This being so, the Committee of the Trades Union paid, or proposed to pay, the costs which their officers had incurred. Oram, who was a member of the Union, brought the action to restrain the Committee from making what he contended was an improper application of the funds of the Union, and he succeeded before Swinfen Eady J. and before the Court of Appeal upon two grounds, that the rules of the Union did not permit of such an application of the funds, a ground which of itself would be enough to warrant the judgment, and upon the further ground to which no doubt the greater prominence was given, that it was unlawful for the Union to interfere in the suits between their officers and the slanderer, that it was an unwarranted act of maintenance and therefore must be ultra vires.

The discussion turned a good deal upon the consideration of the questions of common interest and the right of a master to maintain or support a suit by his servant. The judges

(1) [1914] 1 Ch. 98.

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held that there was no such common interest, and no such relation of service as to warrant the interference of the Union. Whether in this respect they did not put an unduly narrow construction upon these principles is not material to the case now before your Lordships.

What is material and what carries the present case a certain length in favour of the plaintiff, Neville, is that they decided that the maintenance and support of a just and successful suit is none the less an officious interference, and unless brought within some of the recognized categories of excuse, unlawful. But the Court did not decide upon the second matter which is a necessary step in the present case—namely, that such an interference is not only unlawful, but gives to the other party in the suit who has lost, and rightly lost, his case an action for damages against the maintainer upon the ground which is somewhat humorous, that but for his interference justice would not have been done.

This point could not have arisen in *Oram* v. *Hutt* (1), and, as it so happens, Lord Parker in his judgment in the Court of Appeal expressly reserved it.

It follows that the Court of Appeal should not have made such short work of the present case, and that the whole matter must be, as it has been at your Lordships' Bar, opened and considered.

The law of maintenance is stated in the text-books to be in itself part of the common law though affirmed or declared and supported by various ancient statutes. These, as I gather, at any rate those which were brought to your Lordships' notice, are the following :—

3 Edw. I. cc. 25, 28.
20 Edw. I. Ordinance concerning conspirators.
28 Edw. I. c. 11.
1 Edw. III. st. 2, c. 14.
4 Edw. III. c. 11.
1 Rich. II. c. 4.
7 Rich. II. c. 15.
32 Hen. VIII. c. 9,

(1) [1914] 1 Ch. 98.

which have been analyzed by my noble and learned friend, Lord Shaw, and to which I would add 3 Hen. VII. c. 1.

A perusal of these statutes shows that in the days when they were enacted the ordinary subject of the King found great difficulty in procuring a fair trial when his adversary was in some privileged position. Sometimes the King's officers were induced by a bribe or by the offer of a share of the spoil to favour his adversary. Sometimes great men gave countenance to his adversary, sometimes confederacies were formed to support unjust claims or defences. And the statutes are directed against maintenance, champerty and confederacy or conspiracy, while embracery and subornation of perjury were some of the means used to secure these unlawful ends.

Great men gave liveries to large bodies of retainers and supported them in their unjust quarrels. A convenient summary of the state of society in England during this period can be found in Hallam's Middle Ages, Vol. III., Part III., Chap. VIII., pp. 245, 246 (ed. of 1829), and in his Constitutional History, Vol. I., Chap. I., pp. 69-73 (ed. of 1829); and the Act 3 Hen. VII. c. 1, already referred to, created a special Court consisting of certain great officers of State and judges which sat in the Star Chamber for the express purpose of correcting and preventing such miscarriages of justice.

So mischievous might maintenance be that the statutes strike against it in general or absolute terms. But the judges construed them, as they interpreted the common law, as not being so absolute, but as admitting of exceptions and as permitting a subject to maintain another's suit or defence when the relations were such that there was a common interest, or the master was helping his servant, or even when the act was done out of charity to a poor man.

There is no warrant in any of the statutes for many of these exceptions. The only warrant for any exception is to be found in 28 Edw. I. c. 11, known as "Articuli super Chartas." This allows a man to have counsel of "ses prochaines amis."

How then were the judges enabled to make these exceptions? It appears to me, my Lords, that it can only have been because all maintenance was not evil.

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The passages in Lord Coke and his citations from earlier writers have been already given by Lord Shaw; and they appear to show that it is maintenance of an unjust or at least a wrong cause or defence which is unlawful, and even this is excused by the ties of kinship or the promptings of pity.

The only passage in Coke which points in another direction is that where he quotes Fitzherbert and two passages apparently from the Year Book, and says that an action for champerty may be brought, hanging the principal plea before judgment—be it observed champerty not maintenance,—and while the issue is uncertain, not when the event has shown that the action or defence maintained was right.

I venture to lay stress upon the fact that it was as unlawful to maintain a defendant, unless in the excusable cases, as it was to maintain a plaintiff. The language of the statutes shows this.

In two of the three writs which are given as precedents in the Registrum Brevium, if I rightly understand them, the complaint is for maintenance of the defendant, and in quite modern times in the case of *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.* (1) the cause of action was for maintaining a defence.

It is indeed obvious, and Hallam points out, that in those times much of the litigation in our courts arose out of "Disseisin, or forcible dispossession of freeholds" and that the mischief to be provided against was the unlawful support of the disseisor.

Fitzherbert's Abridgment has the following passages which are the only material ones, if indeed the first is material, paragraphs 17 and 20, which I translate :—

"Note that it was said that notwithstanding that the plaintiff has recovered (in his action) he may still have a writ of maintenance against him who maintained the defendant, because the statute is prohibitory in itself. (Year Book, Michaelmas Term, 7 Edw. 4, 5, 6.)"

"A man shall have a writ of maintenance notwithstanding that he was nonsuited in the action in which maintenance is

(1) [1908] 1 K. B. 1006.

supposed (Easter Term, 33 Edw. 3). Contrary Year Book, 7 Hen. 4 in the King's Bench."

There are apparently no Year Books from 30 Edw. III. to 39 Edw. III. And a reference to the index of subject-matter does not give any passage anywhere in the Year Books of Edw. III. down to the fortieth year of the reign which can be this passage.

The passage supposed to be contrary to the proposition supposed to be taken from 33 Edw. III. is not contrary to it as stated by Fitzherbert. I translate it as follows :—

"Writ of maintenance was brought suggesting (alleging) that the defendant had maintained a suit in an assise of novel disseisin coram vobis summonita et capta. Tille. Judgment on the writ, for that the writ suggests by this word (captą) that the assise was taken, while we inform you that the plaintiff was nonsuited and the assise was not taken, wherefore judgment on the writ. Culpeper. Since you do not deny the maintenance at the assise whether the assise was taken or not this word capta is not material wherefore we demand judgment and pray for our damages et sic ad judicium. Gascoyne. You shall have another wr t suggesting that the assise was summoned but not taken (i.e. the Jury were summoned but no verdict was taken) per quod etc." 7 Hen. IV., Coram Rege, Mich. T., pl. 8, p. 30.

The reference to 33 Edw. III. is one of those given by Coke. He may have taken it from Fitzherbert without verification.

His other citation is from the Year Book of 47 Edw. III. I have translated the material passages.

"Ralph de Norton brought his action for champerty against Richard de Norton and declared through Persay (? his counsel) that as by the statute made by Edward grandfather of our Lord the King who now is for the profit of his kingdom, it was ordained that neither his Minister nor any one else should take or maintain the quarrel of another neither for a tenement nor for any other thing in consideration of some part of the thing in demand, and that it should not be lawful to any man to assign his right to another etc. Yet when one Thomas Winwike brought an assise etc. against him Ralph and Elinor his

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wife for tenements in Birley, he thereupon took up the quarrel of the plaintiff the said Thomas Winwike so that by reason of his maintenance the assise passed against him Ralph and his wife wrongfully" (so I translate "a tort." It might be "to his injury"), "and he has been damaged to the amount of 1000 marks." And the writ ran "cepit manutenendum et adhuc manutenet," and in the writ and the declaration it was suggested that he who brought the assise had got execution and that he against whom the action (for maintenance) was brought had purchased the land (in dispute).

Tanke (counsel for the defendant) takes the point that the assise had been against husband and wife and wife is not now suing. Belknap (a counsel for the plaintiff) answers that this action is not to recover the land but for damages for the wrong which the husband can bring alone, and he asks for judgment.

During the course of the argument Finch or Finchdeen, apparently the presiding judge, says :—

"Also a man shall have a writ of champerty though he has lost nothing *and even while the suit is still pending* so that the loss of the estate is not the only cause of action. By which it appears that who was tenant of the land at the time when the assise passed is not to the purpose in this action which is not given to recover the land but only for damages." Goes on about relation of husband and wife. Tanke takes the instance of an attaint in which case he says there would be an abatement.

Finch: "You say truly," and gives reasons. Tanke: "Sir, you see that his writ suggests quod cepit manutenendum et adhuc manutenet, and by his declaration he suggests that the assise passed against Ralph, and that since this time we have bought the land of Thomas Winwike, therefore according to the matter which he shows the plea is determined and executed since which time the plea cannot be maintained, therefore his word 'maintains' and his writ are false for which reasons, etc., we demand judgment, etc." Hasty: "Let us suppose that Ralph was now in a position to bring a writ of attaint it would be right to bring the writ against Richard Norton because he is the tenant, etc. This also is champerty. Therefore there is

enough to satisfy this word 'maintains.' Wherefore, etc." Finchdeen to the same effect: "It might be that because of his doubt of Richard he would not dare to bring his writ of attaint. Therefore the word 'maintains' shall not abate his writ."

It is difficult in my opinion to get any clear principle from these passages.

In *Bradshaw* v. *Lowe* (1), decided in Michaelmas term 24 & 25 Eliz., there was an information against Lowe for maintaining a bill in the Duchy Chamber against Bradshaw, to which exceptions were taken.

The fourth exception was that the information stated that defendant maintained, and not that he unlawfully maintained. Counsel on the other side said that any maintenance should be intended to be unlawful, but the case was likened to an indictment and the defect was held to be fatal.

Except in so far as the passage in Fitzherbert with its reference which cannot be traced and the two cases in the Year Books which I have translated may be held to support the proposition, I find no case that decided that it is unlawful to maintain a just cause or a just defence before *Wallis* v. *Duke of Portland* (2), and query as to that case.

Wallis was an attorney who had acted for one Tierney the unsuccessful candidate at the poll for election to Parliament. Wallis on behalf of Tierney presented an election petition praying that the sitting member might be unseated and claiming the seat. At the time when the Chancery proceedings were taken the proceedings in the election petition had come to a conclusion and Tierney had been successful.

Wallis then filed a bill against the Duke alleging that it was upon the Duke's instructions and undertaking to be answerable for costs that he had presented the petition in the name of Tierney, but that the Duke refused to pay, and further stating that he could not succeed in an action at law unless the Duke was compelled by Chancery process to give him discovery.

To this Bill the Duke demurred, and the demurrer was upheld by the Lord Chancellor and on appeal by your Lordships' House.

(1) (1582) Savile 41. (2) 3 Ves. 494: 8 Bro. P. C. 161.

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In giving his judgment the Lord Chancellor spoke much about maintenance being malum in se and of the impropriety of granting any assistance to forward a claim based upon an alleged bargain which could be contrary to public policy, and unlawful.

But there were, as he indicated, other objections to the bill which it seems to me might of themselves have been sufficient to support the demurrer.

The report of the case in Brown is like other reports in that series, not a report of the arguments at the Bar or of the reasons which the noble Lords gave for their conclusions.

It is a statement of the record as it reached your Lordships' House and of the cases filed for the appellant and for the respondent with the reasons given in support of either case, which are treated as if they were a synopsis of the arguments at the Bar.

The reasons given in the appellant's case profess to discuss the arguments for the other side under five heads and to meet them. From this it would appear that one point taken was that the alleged agreement could not be enforced because there was no note of it in writing as required by the Statute of Frauds.

Another reason was that the discovery sought was immaterial, and the other reasons dealt in various forms with the point as to maintenance, one branch of it being that the alleged action on the part of the Duke was an interference by a peer in the conduct of an election against the Standing Orders of the House of Commons. The one short reason as Brown puts it, given on behalf of the respondent, was a compound reason, one half relying upon the doctrine of maintenance, and the other half upon the rules of Chancery procedure.

Dealing with the point of maintenance it is not difficult to suppose that there may be a wide distinction between an action and an election petition. It can hardly be said that an unsuccessful candidate at a Parliamentary election, even though he be in a position to claim the seat, has rights in the sense that a plaintiff with a good cause of action or a defendant with a good defence has rights, and it might well be held that

all intermeddling by strangers in the matter of a Parliamentary election, more especially if that stranger was a peer, would be contrary to public policy. So it might possibly be held to be against public policy to maintain a common informer's action for penalties.

From *Wallis* v. *Duke of Portland* (1) there is a long gap to *Bradlaugh* v. *Newdegate* (2), where Lord Coleridge C.J. was prepared to hold (though in the result it was not necessary) that the maintainer of a successful plaintiff must recoup the unsuccessful defendant in respect of all the damages and costs he had to pay.

There are some dicta to the same extent in other recent cases, but none to show any settled jurisprudence with which your Lordships should be unwilling to interfere.

There remain the institutional writers of the eighteenth century, Hawkins and Blackstone, whose language has been quoted by Lord Shaw.

In their view the evil of maintenance lay in the stirring up of strife. My Lords, I think this was bad archæology. Maintenance is on a par with champerty, conspiracy and embracery. The doctrine was established to prevent injustice.

These writers cite no other material cases than those which have been mentioned, and all that need be said is that, there being a good reason for the origin of an established rule of law, they supposed a wrong reason which would, if the case had arisen in their time, have led them too far.

My Lords, if the view which I have indicated be correct, the defendant company did no unlawful act. It did indeed maintain a suit, but the justification or excuse is to be found in the righteousness of the suit and the proof of its righteousness is its success.

But even if it were otherwise the plaintiff Neville has yet to prove that he sustained any private injury, such as the law recognizes as some invasion of his rights as a citizen by reason of the unlawful act of the defendant company.

My Lords, I conceive that if it be an offence to promote a

(1) 3 Ves. 494; 8 Bro. P. C. 161. (2) 11 Q. B. D. 1.

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just action or support a just defence, there is still no private injury which ensues therefrom. Conceive of things otherwise ?

I take the case of a defence as no doubt the more striking. If the law were to be as suggested it would be the right of a bully to say, keep out of the way, form a ring, let me knock the other man down, if you interfere I shall send for the police.

A close parallel can be drawn from the law of libel. It was (and still is subject to a statutory qualification) unlawful and indictable to publish in writing or print defamatory matter of an individual. But if the defamatory matter be true the individual has no right of action. He cannot complain of that which he has brought upon himself by his own conduct.

So a man who does not pay his just debts or make good his torts cannot complain that he has been compelled (howsoever) to pay or make good.

Still less can he complain if he has been successfully resisted when he was making an unjust claim.

The case could be put on a lower but still sufficient ground. Your Lordships are all agreed that the plaintiff Neville cannot, in this action, recover either the costs which he had to pay or those which he had to bear in the Chancery action. A fortiori he cannot recover the damages which he was adjudged to pay. There are then no damages on which he can lay his finger, which he has suffered.

And so it must be in every case where the suit or defence maintained has been right.

No doubt there are instances where a plaintiff may have a good cause of action but in the particular result the damages will be nominal. But I know of no class of action where the damages must be always nominal. Our law gives no encouragement to such actions. I am glad to find that upon this ground I am in entire agreement with my noble and learned friend the Lord Chancellor, as I have been throughout with my noble and learned friend Lord Shaw.

My Lords, for the reasons which I have given, I think that as to the part of the action which relates to maintenance, judgment should be entered for the defendant company.

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Order of the Court of Appeal affirmed, so far as regards the question of libel, and discharged, so far as regards the question of maintenance, and judgment entered for the defendants on the said claim for maintenance. Original appeal dismissed. Neville to pay the costs of the original appeal and also the costs of the cross-appeal, so far as relates to the question of maintenance, and the London "Express" Newspaper, Limited, to pay to Neville the costs of the cross-appeal, so far as relates to the question of libel.

Lords' Journals, December 16, 1918.

Solicitors for appellant: *Vaughan & Williams.*
Solicitors for respondents: *Carter Harrison & Armstrong.*

[HOUSE OF LORDS.]

H. L. (E.)* 1918 Dec. 12.

BANK LINE, LIMITED . . . . . APPELLANTS;

AND

ARTHUR CAPEL AND COMPANY . . . RESPONDENTS.

Ship—Charterparty—Impossibility of Performance—Time Charter—Requisition by Government—Frustration of Adventure.

The principle of frustration of the adventure applies to a time charter.

By a charterparty of February 16, 1915, the defendants agreed to let a steamer to the plaintiffs, the charterers, for twelve months from the time the vessel should be delivered and placed at the disposal of the charterers at a coal port in the United Kingdom as ordered by the charterers, to trade between safe ports within certain specified limits The charterparty excepted loss or damage arising from restraints of princes. It also provided (1.) (clause 26) that, should the steamer not have been delivered on April 30, 1915, the charterers should have the option of cancelling the charter, and that, should it be proved that the

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* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD WRENBURY.

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steamer through unforeseen circumstances could not be delivered by the cancelling date, the charterers, if required, should, within a prescribed time after receiving notice thereof, declare whether they would cancel or take delivery; (2.) (clause 31) that the charterers should have the option of cancelling should the steamer be commandeered by the Government during the currency of the charter. The steamer was not delivered on April 30, and on May 11, before delivery, the steamer was requisitioned by the Government, but the plaintiffs did not exercise their option to cancel. In August the defendants agreed to sell the steamer to third parties conditionally on obtaining her release from the Government, and the Government consented to release the steamer on being provided with a substitute. The ship was released in September and the sale was effected. The plaintiffs claimed damages for non-delivery of the steamer:—

Held: (1.) that the application of the principle of frustration was not excluded by the special terms of the charterparty; (2.) (by Lord Finlay L.C., Lord Shaw of Dunfermline, Lord Sumner, and Lord Wrenbury; Viscount Haldane dissenting) that the requisition and detention of the steamer destroyed the identity of the chartered service and entitled the defendants to treat the charterparty as at an end.

The principle of frustration discussed by Lord Sumner.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing a judgment of Rowlatt J.

The appellants were the owners of the steamship *Quito*, and the respondents were the charterers of that vessel under a time charterparty dated February 16, 1915. The question for decision was whether, as the result of the requisitioning of the *Quito* by His Majesty's Government, after the date of the charterparty, but before the vessel had actually entered on her service thereunder, the adventure contemplated by the charterparty became frustrated and the contract terminated.

The facts are fully stated in the judgment of the Lord Chancellor. The action was brought by the charterers for a declaration that the charterparty was not dissolved by the ship's having been requisitioned and that the owners were bound to deliver her to the charterers.

Rowlatt J. held that the effect of the requisition was to put an end to the charterparty.

The Court of Appeal, by a majority (Pickford and Warrington L.JJ.; Scrutton L.J. dissenting), reversed the decision of the learned judge and gave judgment for the

plaintiffs for 13,344*l.*, the amount of the damages provisionally assessed by the judge.

Nov. 14, 15. *MacKinnon K.C.* (with him *Raeburn*) for the appellants.

A contract made in February between a shipowner and a charterer for chartering a ship for twelve months from April is so materially different from a contract for chartering the ship for twelve months from September that the whole substratum of the contract is gone and the parties are relieved from their respective obligations thereunder. The question does not depend upon any provision as to giving notice of cancellation, which comes to an end with the rest of the contract. The effect of such a radical change in the conditions of the contract is that the contract dies.

Leck K.C. and *Robertson Dunlop* (*Sir Robert Aske* with them) for the respondents.

On the terms of this charterparty it is impossible to imply a condition that the requisition of the ship avoided the contract. The owners remain under the explicit obligation to place the ship at the charterers' disposal, but under clause 26 the charterers have an option to put an end to the contract. That clause does away with the doctrine of frustration from causes provided for by the clause, and so far as this case is not covered by clause 26 it is covered by clause 31, which has the same effect as to commandeering as clause 26 has to all other cases of delay. So long as the vessel is in existence it is possible for the owners to perform their contract. No term can be implied which is inconsistent with the express terms of the contract. Upon any view of the contract the owners have failed to show any frustration in fact. This was not a contract for delivery at any particular date; it remained what it always was—a contract for the hire of the ship for twelve months from the time when the ship was delivered.

They referred to *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) and *Metropolitan Water Board* v. *Dick, Kerr & Co.* (2)

(1) [1916] 2 A. C. 397, 403. (2) [1918] A. C. 119, 129, 132-3.

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Raeburn in reply.

There is no inconsistency between the express terms of the contract and frustration by long delay. Clause 26 was inserted to enable the charterers to take advantage of a short delay, and does not imply that the owners must hold the steamer at the disposal of the charterers for an indefinite period. The same remarks apply to clause 31. *Scottish Navigation Co.* v. *Souter & Co.* (1) shows that there may be an implied term for putting an end to the contract on the ground of frustration, notwithstanding an express provision dealing with the same subject. "The mere introduction of exceptions or stipulations dealing with certain contemplated contingencies . . . . is not of itself sufficient to indicate an intention to exclude the implied condition": Per Bankes L.J.; and see *M'Andrew* v. *Adams*. (2) On the question whether there was a frustration in fact the principle laid down by Scrutton J. in *Embiricos* v. *Sydney Reid & Co.* (3) applies—namely, that commercial men are not obliged to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not, but are entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds.

The House took time for consideration.

Dec. 12, 1918. LORD FINLAY L.C. My Lords, in this case an action was brought by Messrs. Capel & Co., the respondents, against the Bank Line, Limited, the appellants, to recover damages for failure by the defendants to put at the disposal of the plaintiffs the steamship *Quito*, which the plaintiffs had chartered from the defendants for a period of twelve months. The points of defence allege that the vessels had been requisitioned by the British Government, and that the charter was put an end to by such requisitioning from its date, May 11, 1915.

The case was tried by Rowlatt J., who held in favour of the defendants that the requisition had put an end to the contract.

(1) [1917] 1 K. B. 222, 247. (2) (1834) 1 Bing. N. C. 29.
(3) [1914] 3 K. B. 45, 54.

On appeal the majority of the Court of Appeal (Pickford and Warrington L.JJ.) reversed this decision. Scrutton L.J. dissented, and expressed his agreement with the conclusion arrived at by Rowlatt J.

The Bank Line, Limited, have now appealed to this House, and ask that the judgment of Rowlatt J. should be restored.

The charter is dated February 16, 1915, and was entered into between the appellants, owners of the *Quito*, and the respondents, the charterers. By the first clause the owners agreed to let, and the charterers to hire, the steamer for a term of twelve calendar months from the time the vessel should be delivered and placed at the disposal of the charterers ready to load at a coal port in the United Kingdom as ordered by charterers to be employed in trade between safe ports and places within the limits of the United Kingdom, France, the Bay of Biscay, Portugal, Spain, and the Mediterranean not east of Sicily during the war.

By the fifth clause the charterers were to pay as hire 291*l.* per calendar month, commencing from the time the steamer was placed at their disposal. By the fourteenth clause it was provided that throughout the charter losses or damages, whether in respect of goods carried or to be carried, or in other respects, should be absolutely excepted if they arose from certain causes enumerated, among which were the act of God, perils of the sea, and arrests and restraint of princes, rulers, and peoples.

The two most important clauses for the purposes of the present appeal are the twenty-sixth and the thirty-first, which run as follows :—

> 26. "That the steamer shall be delivered under this charter not before April 1, 1915, and should the steamer not have been delivered latest on the 30th day of April, 1915, charterers to have the option of cancelling this charter.
>
> "That should it be proved that the steamer, through unforeseen circumstances, cannot be delivered by the cancelling date, charterers, if required, shall within forty-eight hours after receiving notice thereof declare

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whether they cancel or will take delivery of the steamer."

31. "Charterers to have option of cancelling this charterparty should steamer be commandeered by Government during this charter."

The vessel was not ready by the cancelling date (April 30, 1915), but the respondents did not exercise their option of cancelling, nor were they invited to say whether they would cancel or not. The *Quito* went into dry dock at Hull to prepare for entering upon service under the charterparty, and while there she was, on May 11, requisitioned by the British Government. Efforts were made by the charterers and owners to get her released, but without success. On May 17 the charterers wrote that they had informed the owners that they would take the steamer on her original charter on the same conditions for twelve months, if tendered to the charterers any time within the next three months, but no agreement was arrived at as to this suggestion. The efforts to get the vessel released ceased early in June, 1915, and there was no further communication between the parties on the subject until September 3, 1915. On this last day the charterers, who had heard that the owners were selling the *Quito*, having got the Government to release her, called upon them to deliver the steamer under the charter. The owners replied on the same day that in their view the charter had long since become inoperative, as the owners were prevented from tendering the steamer within the exceptions in the charter, and added that the request that the owners should tender the steamer seemed to ask them to enter into an entirely new agreement, and not such as was contemplated by the charter of February 16.

The facts were that in July, 1915, the appellants had received from third parties an offer to purchase the *Quito* which on August 11 they accepted, subject to their being able to procure her release from the requisition. On August 17 the Government intimated that they would release the *Quito* provided the owners replaced her by another vessel of theirs—the *Mansuri*—which was free of engagements, and on

September 2 this was carried out and the *Quito* was released.

The appellants contend that they were not liable in the action, on the ground that they were entitled to treat the charterparty as at an end owing to the requisition by the Government, and the detention under it, as this amounted to a frustration of the adventure by circumstances beyond the appellants' control. The respondents urged that on the construction of the charterparty all application of the doctrine of frustration was excluded, and denied that there was in fact any frustration of the adventure. Rowlatt J. and Scrutton L.J. held that the charterparty was at an end, the adventure having been frustrated; while Pickford L.J. and Warrington L.J. held that the charterparty was still in existence, and awarded the plaintiffs damages on a scale which worked out at 31,000*l.*

The doctrine that a contract may be put an end to by a vital change of circumstances has been repeatedly discussed in your Lordships' House, and most recently in the case of the *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1), in which a great number of cases were reviewed. I do not propose to repeat what has been said in these cases on the law of the subject, which is well settled, and proceed at once to consider the application of the doctrine to the circumstances of the present case.

The first question that falls to be determined is whether, as contended by the respondents, the doctrine of frustration of the adventure as terminating the contract is excluded by the terms of the charterparty. The clauses relied on as having this effect are clauses 26 and 31. In my opinion neither of these clauses can have the effect of preventing the termination of the charterparty by the requisition in the present case and the detention under it.

The twenty-sixth clause provides that if the steamship should not have been delivered by the end of April, 1915, the charterers were to have the option of cancelling the charter. This option would apply, if there were any delay

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beyond April 30, and if the delay was through unforeseen circumstances (in other words, if it was not due to the default of the owners) it was provided by the second paragraph that the charterers might be called on to declare within forty-eight hours whether they cancelled or would take delivery of the steamship. It was urged for the respondents that this clause meant that only the charterers could cancel in case of non-delivery, and that however long the owners might have been prevented from delivering by unforeseen circumstances beyond their control, they were bound to hold the vessel at the disposal of the charterers. I cannot read this clause as having any such effect. The charter was to be for twelve months from delivery, which the owners were to make by the end of April unless prevented by unforeseen circumstances, in which case the charterers had the option of cancelling, however short the delay. If, owing to unforeseen circumstances, it became impossible for the owners to deliver under the charterparty until many months after the end of April, the whole character of the adventure would be changed. A charter for twelve months from April is clearly very different from a charter for twelve months from September. In such a case the adventure contemplated by the charter is entirely frustrated, and the owner, when required to enter into a charter so different from that for which he had contracted, is entitled to say "non hæc in fœdera veni." In other words, the owner is entitled to say that the contract is at an end on the doctrine of the frustration of the adventure as explained in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) It would be quite unreasonable to construe clause 26 as meaning that the owners are in such a case to hold the vessel at the disposal of the charterers for an unlimited period.

In the *Tamplin Steamship Co. Case* (1) the House of Lords was divided three to two, Lord Loreburn, Lord Parker, and Lord Buckmaster L.C. (who concurred with Lord Parker's judgment) forming the majority, while Lord Haldane and Lord Atkinson dissented. But it will be found that the

(1) [1916] 2 A. C. 397.

principles of law enunciated by Lord Loreburn and by the two dissentients are identical; the difference between them being as to the application of these principles to the particular circumstances of the case. The concurrence of Lord Parker and of Lord Buckmaster L.C. with Lord Loreburn was to some extent rested on the ground that a clause in the charter providing for the case of restraint of princes would exclude the doctrine of frustration of the adventure as terminating the contract. This proposition should not, in my opinion, be regarded as forming part of the judgment of the House, and the judgment of Lord Parker when scrutinized will be found to treat this as only one of the circumstances which led him to the conclusion that in the case of the time charter which was in question the doctrine of frustration was excluded

Clause 31 cannot be relied on on behalf of the respondents any more than clause 26. Clause 31 merely means that in case of the vessel being commandeered, the charterers might cancel at once without having to show that the detention was likely to last so long as to put an end to the contract within the meaning of the authorities.

The second question must, therefore, be determined—namely, did the requisition of the vessel and the detention under it constitute a change of circumstances such as to entitle the owners to treat the charter as at an end? As events show, the release of the vessel could be procured by providing another instead, but there was no obligation on the owners to do this for the purpose of carrying out the charter. It was only after they had entered into the contract to sell the *Quito* conditionally on procuring her release that the owners provided a substitute to enable them to carry out their contract of sale. The entering into the contract of sale was an act showing that the owners treated the contract of charter as at an end. Were they justified in this? In my opinion they were. They had concurred with the charterers in endeavouring to procure the release by the Admiralty of the vessel. These efforts failed, and were not continued after June 8. On September 3 the charterers learned of the release which had been obtained by the substitution of the

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Mansuri in order to carry out the sale of the *Quito*, and demanded delivery. In my opinion the owners were entitled to reply as they did, that the contract had come to an end as the detention had lasted so long that if the vessel were delivered in September it would be on a contract differing most materially from that provided for by the original charter.

For these reasons I agree with the conclusion arrived at by Rowlatt J. and Scrutton L.J., and think that the appeal should be allowed with costs here and below.

VISCOUNT HALDANE. My Lords, in this case there are two questions: Is the doctrine of what is called frustration excluded under the circumstances by the effect of the special stipulations in the charterparty? The stipulations I refer to particularly are those in clause 14, excepting loss or damage by restraint of princes; that in clause 26, providing for delivery under the charterparty by a certain date, and giving the charterers an option to cancel in the case of such delivery not taking place, and also in the case of being notified of unforeseen circumstances making delivery impossible; and clause 31, giving the charterers an option to cancel should the steamer be commandeered during the currency of the charterparty. If this question be answered in the negative, and it is held that the doctrine of frustration is applicable, was there in point of fact what amounted to frustration?

My Lords, I do not think that there is anything in the charterparty which excludes the doctrine of frustration if the circumstances proved at the trial amount in law to so much. As to the meaning of the principle I have reconsidered what was said by Lord Atkinson and myself in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) I see no reason to depart from what he and I agreed in stating to be the principle, and I do not think that Lord Loreburn said anything really different. Whether, in accordance with the modern tendency, the question is treated as one of construction, and an exception is formulated as implied, or whether, as appears to have been the real ground of the

(1) [1916] 2 A. C. 397.

judgments in *Baily* v. *De Crespigny* (1), the question is regarded rather as one of a common mistake, consisting in the present instance in the assumption that the steamer was one which could be made available, does not matter. What is clear is that where people enter into a contract which is dependent for the possibility of its performance on the continued availability of the subject-matter, and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has contracted to be so. And such cases as *Geipel* v. *Smith* (2) and *Jackson* v. *Union Marine Insurance Co.* (3) show that the application of the principle to a charterparty is not excluded by the circumstances that the contract contains an express exemption clause covering what is matter not fundamental in the same sense, loss or damage from restraint of princes.

The second question is whether in this case what happened amounted to a complete frustration of the adventure. The contract, which was dated February 16, 1915, was for the use of the steamer for twelve months, not from any particular date, but from the time when she should be delivered to and placed at the disposal of the charterers at a coal port to be designated by them. Under clause 26, already referred to, the delivery was to take place not before April 1, and if it did not take place at latest on the 30th of that month the charterers were to have the right to cancel the charterparty. By clause 31 the charterers were expressly given the option to cancel if the steamer should be commandeered by the Government during the charter. I think that this shows that such commandeering was contemplated by the parties as an event which would not necessarily put an end to the basis of their contract, but might merely delay or interrupt the employment of the vessel.

In April the steamer was on a voyage from New York to Rotterdam, and was delayed beyond April 30, the date at which the charterers had an option to cancel. It was not

(1) (1869) L. R. 4 Q. B. 180. (2) (1872) L. R. 7 Q. B. 404.
(3) (1874) L. R. 10 C. P. 125.

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until May 7 that she reached Hull, the port designated by the charterers under the contract, and she had to be dry docked for repairs until May 17. On the 10th of that month the Admiralty intimated that they would requisition one out of several ships belonging to the appellants. The latter indicated that the *Quito*, the steamer in question, was most readily available, but that she was under charter to the respondents. The Admiralty thereupon, on May 11, requisitioned her. The respondents then urged the Admiralty to release the *Quito*, on the ground that she was to be used for supplying France with coal, and the appellants appear to have supported the application. Both parties seem to have contemplated that the requisition might not prove a prolonged one, and that the charterparty might still be capable of being put into operation.

My Lords, I have read the correspondence between the parties which followed on the requisition. In accordance with a well-known rule of construction which lays down that a series of letters must be read as an entirety when it is desired to ascertain whether there was a final consensus, it is not right to pause over phrases subsequently superseded, with a view to picking out an agreement while the matter is continuing in the stage of negotiation. Reading the letters with this rule in mind, I think that their outcome, taken in conjunction with the oral evidence, was that although on May 17, 1915, Mr. Scott, as representing the respondents, writes to his brokers that he had informed the appellants that he would only take the steamer on her original charter on the same conditions for twelve months, if she was tendered at any time within the next three months, nothing came of the suggestion. It is clear that in the subsequent correspondence the parties had in their minds that the requisition had not so far put an end to the charter. Mr. Niven, who represented the appellants, appears from his evidence, given in cross-examination, to have thought that he could have got the *Quito* released at any time by offering the Admiralty another steamer. In the end, in August, he succeeded in this, but he did not make a definite attempt

until he found that he could sell the *Quito* to a stranger. I agree with the opinion of Pickford L.J. that the parties never did take the view that the requisition had either been so long, or would necessarily be so long, as to put an end to the charter. It must be borne in mind that the term was twelve months, not from a definite date, but from the date when the steamer was delivered to the charterers, and that they intended to use her for the carriage of coal across the Channel, a use which they could put her to at any period that was likely to call for it. It appears that the owners never asked the charterers to say whether they would cancel under the clause in the charter-party, or would take delivery of the steamer after release by the Admiralty. Nor did they intimate that the charter was in their opinion at an end, but they left the charterers to await advice from them as to the prospect of the vessel being released. When, on September 2, the *Quito* was released by the Admiralty to her owners, who had nearly a month previously sold her to an outside purchaser, the release was, it is quite true, obtained only for the purpose of the sale, and on condition of substituting another steamer to go under requisition. The appellant owners were not bound to offer such a substitution in order to carry out their bargain with the respondent charterers, but I think the character of the new transaction is relevant to the question whether at this period, or earlier, the appellants considered the requisition to be a necessarily enduring one. If not, I think that, under the terms of the charterparty, it was for the respondents to decide whether the transaction was one which they would wholly abandon or go on with it.

My Lords, whether frustration has taken place is always a question which depends on the circumstances to which the principle is to be applied, rather than upon abstract considerations. I think that this is illustrated by what was decided in this House in the recent case of *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1) and in the other authorities then examined. On the facts before us I am unable to come

(1) [1918] A. C. 119.

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to the conclusion that the appellants have succeeded in showing that the steamer was in point of fact, or was contemplated as being, under permanent requisition of such a character as to make the terms of the charterparty wholly inapplicable. She was required by the charterers for a cross-Channel coal traffic, in which she could apparently have been employed at any date, and although the charter was a time charter, the date of its commencement was not precise. The use to which the vessel was to be put was not in point of fact a use of such a nature that it was frustrated by what happened, and I do not think that the parties at any time came to the conclusion that the prospect of such use was gone. There was therefore, in my opinion, no frustration in fact; and, having regard to the nature of the contract, no frustration in law either. I agree with the conclusions arrived at by Pickford and Warrington L.JJ., and I think that the appeal ought to fail.

LORD SHAW OF DUNFERMLINE. My Lords, the facts of the case have been placed before the House in the address of the Lord Chancellor. The *Quito* was on May 11, 1915, requisitioned by the Government, and was thus by departmental action, the legality of which is not challenged, taken from the service of the parties and placed in the service of the State. This action arose in consequence of the exigencies of war. The vessel was then the subject of the charterparty quoted, and that contract I view entirely from the standpoint taken by Scrutton L.J. In substance she was chartered for twelve months—April, 1915, to April, 1916. When the commandeering by the Government took place, the charterers could there and then have cancelled the contract under s. 31, and this even although the commandeering had only been for a month.

But it was a general requisition, that is to say, the ship might under it be put into the service of the Government for years, and remain in it until to-day. In those circumstances the parties, nonplussed as to the effect of the action of the Crown upon their own business arrangements with

regard to the ship, would naturally be desirous to pause for a little before definitely treating the contract of affreightment as at an end. In my opinion this was exactly what they did. They agreed to wait for three months. That three months expired on August 11. By that time the vessel had not been released, and on that date it appears to me that both parties were free from their temporary arrangement and that their rights are to be determined on the footing that the transfer of the ship to the service of the Government was for an indefinite period.

In those circumstances I will venture to cite *Horlock* v. *Beal.* (1) In that case the disablement (from carrying on a contract of service by the seamen) arose from the declaration of war and the consequent detention of the ship in a foreign port. But it was strongly contended that this did not release the parties from their contract, because nobody could predict whether the interruption would be for anything more than such a short period as might allow the contract to be resumed.

On that topic—the topic of frustration—if I may quote my own address, I said that (2) "stoppage and loss, having arisen from a declaration of war, must be considered to have been caused for a period of indefinite duration, and so to have effected a solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure." And I added: "I do not think that any other rule would be in accord with law, or would work. When a ship is put under detention by a declaration of war, I cannot see room for a condition of affairs which would leave parties in suspense, and feeling that they are bound if the war be short but free if the war be long." The majority of the House took this view. The case had reference to a contract of service during the performance of a contract of affreightment; a fortiori, the same doctrine would apply to that contract itself. And I cite it because it appears to me that the rule or principle there set forth applies in identical terms as well to the case of a declaration of war as to the requisition of the

(1) [1916] 1 A. C. 486. (2) Ibid. 507, 508.

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ship by reason of the exigencies of war, and for an indefinite time, as in the present case.

In the recent cases, my Lords, I have observed that several learned judges have expressed an opinion to the effect that notwithstanding the indefinite suspense to which I have referred, yet nevertheless the contract shall continue binding unless both of the parties shall consent to the contrary. I can give no assent to such a doctrine. There may be many cases in which it would be greatly to the advantage of one party that he should have an indefinite, and it may be a prolonged, hold over the other till performance shall become possible. In my opinion it would be contrary to all sound principle to overlay the effect of the suspense referred to by the necessity of having a consent on both sides to cancellation. No such consent appears to me to be required. I desire further to add that the fact that the contract of affreightment is a voyage charter or a time charter makes no difference in the application of the principle, and that I attach my special assent to the judgment of my noble and learned friend Lord Sumner upon that topic.

With these observations I beg to express my entire concurrence in the opinion and judgment just delivered from the Woolsack.

LORD SUMNER. My Lords, whichever way this case is decided on the facts, it is certainly a very near thing.

From the time when the *Quito* was requisitioned her owners never were in a position to put her at the charterers' disposal for any purpose until after they had sold her. By finding a substitute for her they might possibly have induced the Admiralty to set her free, for such things had been done; but it was uncertain if such an attempt would succeed, and mere importunity proved unavailing. They had not contracted to make this special effort for the benefit of the charterers. It is true that, when they did so for their own benefit, they succeeded, and having got possession of her, they might have been bound to place her at the charterers' disposal under the charter, if that still subsisted, the sale notwithstanding;

but the question is whether the charter had previously come to an end by frustration. If it had, they were not bound to give the charterers a first chance of a new contract.

What then was the nature of the charter? It was not in form an April to April charter, but it was sufficiently so in substance. If the ship had been placed at the disposal of the charterers when released by the Admiralty, she would virtually have been in their hands for a September to September hiring. The mere change in the initial month of the actual hiring is not quite the point, for this is not the old comparison of a summer with a winter voyage. In either case she would have been on hire for each month of the twelve, and the exact cycle of the seasons would make little difference to her. What is important is this. During all the months of the *Quito's* service for the Admiralty the charterers would not in the least know when, if ever, they would have her on their hands. They could not tell whether they might suddenly have to find employment for her, or whether they must make provision for the current necessities of their trade without counting upon her at all. In one respect they would be at an indubitable disadvantage. The postponement of the beginning of her hire at any rate brought nearer the end of the war, after which the charterers would have to pay war rates for the ship and only have the use of her in peace employment. In the latter respect the owners' position also would be one of indecision, for their business is one that requires that they should look ahead, and in doing so they could not tell when, if at all, they were to have the *Quito* once more on offer. These uncertainties in commerce are very serious. Scrutton L.J. asked himself if the September to September employment would be in substance the same employment as that from April to April. I agree with him that it would not; and I think that the uncertainties of the intervening period in time of war both emphasize the difference between the two and add to the gravity of the lapse of time taken by itself.

We find the parties themselves apparently impressed with the idea that any long suspense was intolerable, and that, if the ship could not be promptly released, the engagement

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must be considered as at an end. Their communications with one another ceased early in June; apparently each was waiting to see if something would turn up. So I read their correspondence. The charterers' agent actually spoke to the owners' representative in the sense that, if the *Quito* was to be released, he would be prepared to consider a new charter, and although the brokers deprecated what he had done, it was not so much that they differed from him in thinking that the old charter was dead as that they thought it better not to say so except without prejudice. The owners left the matter there, but presently they sold the *Quito*. They did so without communication with the charterers. It is more reasonable to refer that they also thought the old charter was dissolved than that, thinking it to be alive, they hoped to escape disputes with the charterers by trying to keep secret what they were doing.

One matter I mention only to get rid of it. When the shipowners were first applied to by the Admiralty for a ship they named three, of which the *Quito* was one, and intimated that she was the one they preferred to give up. I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated. Nothing, however, was made of this in the courts below, and I will not now pursue it.

What then is the legal bearing of these facts? The charter is a time charter, and the principle of frustration was originally decided on a voyage charter. For some time it was thought that the frustration rule had no application to time charters, upon the ground that, if the shipowner's object is to receive chartered hire, as probably it is, he does not care how much the charterer's adventures are frustrated so long as he is able to pay. This was the view both of Bailhache J. in the case of the *Auldmuir's* charter (*Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* (1)), and of Sankey J.

(1) [1916] 1 K. B. 429, 437.

in that of the *Dunolly* (*Scottish Navigation Co.* v. *Souter & Co.* (1)); and though the Court of Appeal reversed their decisions (2) some colour was given to their view by the fact that the references in those charters to a "Baltic round" were treated as giving them the characteristics of a voyage charter although they were charters for time. Sankey J. in terms said that the principle "is confined to cases where it can be inferred from the charter itself that it is a contract for a definite voyage, or a definite object contemplated at first by both parties." His notion was that both must have had a common interest in an adventure and one and the same object in view when contracting. "The only object which both must have known each had in view" and "the object of common contemplation" are the expressions of Bailhache J. Atkin J. expresses the same opinion in *Lloyd Royal Belge Société Anonyme* v. *Stathatos*. (3) This way of looking at the contract fixes attention on its subjective aspect and asks what was actually in two hard bargainers' minds. Objectively the question is what does the law impute to them as fair dealers and deem to have been their meaning, which, as we constantly see in questions of construction, may be a very different thing. Again Bailhache J. says (4): "It seems to me impossible to apply the doctrine of frustration to a case where one of the parties to the contract is fulfilling his part of the contract according to its terms," either in the owner's case by letting the charterer have the ship and leaving him to find a use for her or in the charterer's by paying his hire punctually. To this I think Swinfen Eady L.J. (5) gives the sufficient answer. "It is the further performance of the contract by one party which formed the consideration for the payment by the other, which has become impossible, and this effects a dissolution of the contract." Lawrence J. also says that in a time charter the owner's object is not only to get hire but to afford the services, which the

(1) [1916] 1 K. B. 675, 681.
(2) [1917] 1 K. B. 222.
(3) (1917) 33 Times L. R. 390.
(4) [1916] 1 K. B. 438.
(5) [1917] 1 K. B. 237, 250.

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charterer pays for, although money is their common motive. Lord Parker of Waddington in *Tamplin's Case* (1) drew attention to the difficulties attending on the adaptation of the doctrine to a time charter of long duration, which all must recognize, but did not express the opinion that it was inapplicable to time charters as such, and it is now settled that, although the doctrine may have to be somewhat specially applied, time charters do not fall outside the rule. *Scottish Navigation Co.* v. *Souter & Co.* (2); *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* (3); *Anglo-Northern Trading Co.* v. *Emlyn Jones and Williams* (4); *Countess of Warwick Steamship Co.* v. *Le Nickel Société Anonyme* (5); and finally *Metropolitan Water Board* v. *Dick, Kerr & Co.* (6) are the authorities for this.

All these are cases of delay arising out of the exigencies of the present war; and the length of the delay was especially dwelt on in the particular circumstances of *Tamplin's Case*. (7) Bailhache J. says (8) that the main thing to be considered is the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration of the charterparty, and I agree in the importance of this feature, though it may not be the main and certainly is not the only matter to be considered. The probabilities as to the length of the deprivation and not the certainty arrived at after the event are also material. The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do. On this the judgments in the above cases substantially agree. Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when

(1) [1916] 2 A. C. 397, 425.
(2) [1916] 1 K. B. 675, 681.
(3) [1917] 1 K. B. 222.
(4) [1917] 2 K. B. 78; [1918] 1 K. B. 372.
(5) [1918] 1 K. B. 372.
(6) [1918] A. C. 119.
(7) [1916] 2 A. C. 397.
(8) [1917] 2 K. B. 84.

the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided. That fate is dissolution or continuance and, if the charter ought to be held to be dissolved, it cannot be revived without a new contract. The parties are free.

Again, it does not seem to be in itself a matter of crucial importance whether the performance of the charter has begun or not. The charter in *Jackson's Case* (1) has often been wrongly referred to as purely executory (e.g., per Lord Watson in *Dahl* v. *Nelson, Donkin & Co.* (2)), but the ship was on her way to load and had begun the chartered voyage, which did not begin merely at the port of loading. Blackburn J.'s remarks in *Geipel* v. *Smith* (3) raised a doubt which was also present to the mind of Lord Parker of Waddington in *Tamplin's Case* (4), but I think that *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (5) disposes of it. See *Embiricos* v. *Sydney Reid & Co.* (6) Of course it may be very material in considering the prospect of delay to know whether the ship is light or loaded. If loaded, delay is likely to be longer and more serious ; but on the other hand, the prospect of ultimate fruition from the adventure, which is at any rate begun, is thus increased. The present charter I treat as wholly executory, for although the charterers had definitely named Hull as the loading port, the hiring was not to commence till the *Quito* was placed at their disposal there, which never took place.

The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties. "Where the contract makes provision" (that is, full and complete provision, so intended) "for a given contingency it is not for the Court to import into the contract some other and different provision for the same contingency called by a different name": Bailhache J. (7) This is a matter of

(1) L. R. 10 C. P. 125.
(2) (1881) 6 App. Cas. 38, 62.
(3) L. R. 7 Q. B. 404, 413.
(4) [1916] 2 A. C. 397, 428.
(5) [1897] A. C. 609.
(6) [1914] 3 K. B. 45.
(7) [1916] 1 K. B. 438.

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construction according to the usual rule. A contingency may be provided for, but not in such terms as to show that the provision is meant to be all the provision for it. A contingency may be provided for, but in such a way as shows that it is provided for only for the purpose of dealing with one of its effects and not with all. In the present case three clauses are relied on as express provisions for the event and consequences of an Admiralty requisition delaying or preventing the placing of the *Quito* at the charterers' disposal, Nos. 14, 26, and 31. When the Admiralty requisitioned her she became subject to a restraint of princes, one of the causes mentioned in clause 14, which says "throughout this charter losses or damages, whether in respect of goods carried or to be carried or in other respects arising or occasioned by the following causes, shall be absolutely excepted." In the first place, I think this claim is not for "loss or damage" within that clause, but in the second the meaning of such an ordinary clause of exception is well settled. It excuses breaches of the contract caused by matters which fall within its terms; it suspends the liability to pay hire without finally determining it; but relief from the liability to pay damages or hire and complete discharge from further obligation to perform the contract are different things. "Restraint of princes throughout this charterparty always excepted" and "the contract to be no longer binding if a restraint of princes frustrates its commercial object" are neither in my opinion mutually inconsistent clauses nor such that the expression of the first intimates an intention that restraint of princes is not to be dealt with further and otherwise, so as to preclude any implication on the subject.

The same may be said of clause 31. It means that, if the Admiralty should requisition the ship, the charter may be forthwith cancelled by the charterers, without waiting to see or having to show that its object is thereby frustrated. This is a separate provision from that which the appellants seek to imply, and is not inconsistent with it. As to clause 26, the cancelling clause, I am unable to accept the construction of it, which makes it mean that after April 30 and until the

ship is delivered for the chartered service, however long the interval may be, the charterers can at any moment spring on the shipowners a cancellation of the contract, and can hold them bound so long as they choose to hold their own tongues. The shipowners' option given by the second part of the clause was expressly devised to prevent a much less arbitrary use of the right to cancel, and I cannot believe that the clause, if understood as the respondents read it, could ever have become the subject of a consensus ad idem. After all, it is a stipulation in the charterers' favour, and cannot be given so extreme a meaning, unless that meaning is clearly expressed. The parties never meant that the shipowners should remain indefinitely at the charterers' mercy.

The principle of frustration is rendered difficult by some uncertainty as to the tests to be used. In what terms ought the circumstances to be defined, which lead to the dissolution of the contract, and who is to apply them, the judge or the jury? There has been an unfortunate diversity in the terms used in different cases. The expression "frustrate the commercial object of the contract" is taken from *Jackson* v. *Union Marine Insurance Co.* (1) In *Poussard* v. *Spiers* (2) Blackburn J., transferring the rule in *Jackson's Case* (1) from a steamship to a prime donna, says that if the delay "is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo." In *Bensaude's Case* (3) Lord Esher M.R. speaks of delay "so long as to render the adventure which the charterparty was intended to cover absolutely nugatory." In the same case in your Lordships' House each noble and learned Lord in turn employed a new and different expression for the same well-recognized thing. Lord Halsbury speaks of an "impossibility of prosecuting the voyage within the time within which it was necessary to prosecute it"; Lord Watson of "such delay in the prosecution of her voyage as entitled the charterer to determine the adventure" (which, surely wrongly, treats the case like

(1) L. R. 10 C. P. 125.
(2) (1876) 1 Q. B. D. 410, 414.
(3) [1897] 1 Q. B. 29, 31; [1897] A. C. 609, 611, 612, 614.

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Mersey Steel and Iron Co. v. *Naylor, Benzon & Co.* (1) as a case of the determination of a contract depending on the choice of one party instead of resulting automatically from the event); while Lord Herschell says "so that the adventure cannot be completed within the time contemplated," which would make mere unexpected delay sufficient. In *Bush* v. *Whitehaven Trustees* (2) Lord Lindley, then a member of the Court of Appeal, relies on "delay so great as not to be fairly within the terms of the contract at all; that is to say, that the delay was so great that the contract cannot apply to the state of things to which the contractor and the defendants had imagined that it did." It would not be difficult to find other passages in more recent cases where the events which cause dissolution of the contract are diversely described. "An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted." Per Lord Dunedin. (3) "An interruption so great and long as to make it unreasonable to require the parties to go on" is Lord Atkinson's phrase. (4) The fact that delay occurs, the duration of which at the outset is uncertain, obviously is not enough to dissolve the contract: *Braemount S.S. Co.* v. *Weir & Co.* (5) For the time being the performance of the contract must have become altogether impossible, for the consequence is dissolution of the contract altogether, and in this I agree with what Bailhache J. says in the *Anglo-Northern Trading Co.'s Case.* (6)

Delay even of considerable length and of wholly uncertain duration is an incident of maritime adventure, which is clearly within the contemplation of the parties, such as delay caused by ice or neaping, so much so as to be often the subject of express provision. Delays such as these may very seriously affect the commercial object of the adventure, for the ship's expenses and over-head charges are running on and, even with the benefit of Protecting and Indemnity Club policies, the margin of profit is quickly run off. None the less this

(1) (1884) 9 App. Cas. 434.
(2) (1888) Hudson on Building Contracts (4th ed.), Vol. II., 122, 133.
(3) [1918] A. C. 128.
(4) Ibid. 131.
(5) [1910] 15 Com. Cas. 101.
(6) [1917] 2 K. B. 78.

is not frustration; the delay is ordinary in character, and in most cases the charterer is getting the use of the chartered ship, even though it is unprofitable to him. I think also that the doctrine is one which ought not to be extended, though to cases that really fall within the decided rule it must be applied as a matter of course even under novel circumstances. The matter is the more important because of the part which a jury may be called on to play in deciding the question. Ultimately the frustration of an adventure depends on the facts of each case, but it is no easy matter so to direct a jury as that they will neither ask themselves what the actual parties thought of at the date of the contract nor dispose of the case by saying that it would be unreasonable to find a verdict for the claimant nor be governed only by their action of what is fair between man and man nor be left in impenetrable doubt as to what the legal direction means. Lord Watson says in *Dahl* v. *Nelson, Donkin & Co.* (1) that "there may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence." This is an authoritative explanation of the legal theory on which the doctrine rests, but to use it as a direction to a jury is to tell them to do as they like. The phrase "goes to the root of the contract," like most metaphors, is not nearly so clear as it seems. In *Jackson's Case* (2) the jury was asked whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the

(1) 6 App. Cas. 38, 59. (2) L. R. 10 C. P. 125.

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charterers, and in *Bush* v. *Whitehaven Trustees* (1) whether the conditions of the contract were so completely changed in consequence of the defendant's inability to hand over the site of the work, as required, as to make the special provisions of the contract inapplicable. The danger in each case so put is that the jury will think that the contract is as wax in their hands. A. T. Lawrence J. puts the matter very usefully thus in the *Scottish Navigation Co.'s Case.* (2): "No such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document." For my own part I incline to prefer the expression already quoted from my noble and learned friend Lord Dunedin, and substantially adopted by Scrutton L.J. in the Court of Appeal.

My Lords, applying these considerations I am of opinion that the requisitioning of the *Quito* destroyed the identity of the chartered service and made the charter as a matter of business a totally different thing. It hung up the performance for a time, which was wholly indefinite and probably long. The return of the ship depended on considerations beyond the ken or control of either party. Both thought its result was to terminate their contractual relation by the middle of June and, as they must have known much more about it than I do, there is no reason why I should not think so too. I should allow the appeal.

LORD WRENBURY. My Lords, I am unable to find in the charterparty the contractual year from April to April which Scrutton L.J. found and which forms the basis of his judgment. The contract I think was as follows: The owners agreed to let and the charterers to hire the steamer for twelve months, to commence at a date not fixed so far as art. 1 is concerned, except that it was to be the date when she was placed at the disposal of the charterers at a coal port as ordered by them. The effect of art. 26 is that that date

(1) Hudson on Building Contracts, Vol. II., p. 122.

(2) [1917] 1 K. B. 222, 249

may be any date not before April 1 subject to the right of the charterers to refuse her and to cancel the charter if she is tendered after April 30. During a reasonable time the owners owed to the charterers the contractual duty of tendering the vessel. If they were for reasons beyond their control unable to tender her within a reasonable time their contractual duty in this respect would cease. During May and June no doubt they owed this duty. It does not follow that they owed it in September. The question to be answered I think is this. Did this contractual duty still rest upon the owners in September?

As regards art. 31, it seems to me that the words "during this charter" mean "during the subsistence of this contract" and not "during the time the vessel is employed under this contract"; but nothing turns upon the article, for even if the facts would have justified the charterers in cancelling the charter by reason of the commandeering of the vessel they did not exercise their option in this respect.

The principle of *Jackson* v. *Union Marine Insurance Co.* (1) as reviewed in *Horlock* v. *Beal* (2) and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (3) I understand to be that there may under the circumstances of any particular case be added to a contract by implication —so long as the addition is not inconsistent with any expressed term of the contract—a term that a delay for which neither party is responsible so great and so long as to make it unreasonable to require the contracting parties to go on with an adventure shall entitle either of them, at least while the contract is executory, to consider it as at an end. If in the present case such a delay had occurred the owners were entitled to consider the whole contract including art. 26 as at an end, and in such case their contractual duty under art. 26 to tender the vessel no longer existed.

My Lords, I doubt whether down to June 9, when the correspondence between the parties fell into silence, the owners' duty in this respect had lapsed. The interview of

(1) L. R. 10 C. P. 125. (2) [1916] 1 A. C. 486.
(3) [1916] 2 A. C. 397.

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Lord Wrenbury.

May 14 and the letters of May 17 no doubt support an inference that the charterers' view was that a delay of more than three months from that date would so affect the adventure that they would not be bound. However this may be, the facts are that the parties were not able to obtain the release of the vessel at that time and the matter drops into silence until September 3. Was the owner still bound to tender the vessel at that date? Or if the contract had not given the charterers an option to cancel could the owners have compelled them to take her at that date? I think not.

A term cannot be implied which is inconsistent with an express term of the contract; but it is no objection that it enlarges or adds to the express terms; every implied term does that. The express terms of this contract relevant in this respect are only arts. 26 and 31. They are terms which entitle the charterers to cancel in certain events. There is no inconsistency in an implied term which entitles either party to treat the contract as at an end if the date of commencement of the contractual year is by reasons beyond their control postponed beyond a reasonable time. Upon the question of fact I agree that before September that reasonable time had expired and there no longer rested upon the owners the contractual duty to tender her. This I think is what Lord Justice Scrutton intended by his judgment to convey—and if so understood I agree with him. The appeal I think succeeds.

Order of the Court of Appeal reversed and judgment of Rowlatt J. restored. The respondents to pay the costs in the courts below and also the costs of the appeal to this House.

Lords' Journals, December 12, 1918.

Solicitors for the appellants: *Holman, Fenwick & Willan.*
Solicitors for the respondents: *Wm. C. Dawson & Loncaster.*

[HOUSE OF LORDS.]

MALCOLM . . . . . APPELLANT;

AND

LOCKHART . . . . . RESPONDENT.

H. L. (S.)*
1919
Jan. 28.

Revenue—Income Tax—Stallion's Fees—Mode of Assessment—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 63, *Schedule B; s.* 100, *Schedule D, First Case, Sixth Case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedules B and D.*

A farmer owned a stallion which he kept as part of the stock of the farm. During the breeding season he used the stallion for the service of mares on his farm, and in addition he let out the services of the stallion to owners of mares on neighbouring farms and earned substantial profits by this means:—

Held, that the profits earned by the services of the stallion were not profits in respect of the occupation of the farm within Schedule B of the Income Tax Acts, but were chargeable to income tax under Schedule D.

Interlocutor of the First Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts.

The appellant was the tenant of Dunmore Home Farm, Airth, at a rent of 580*l.*, where he kept and maintained a stud of Clydesdale horses and also a herd of pedigree cattle, and as such tenant was assessed to income tax under Schedule B of the Income Tax Acts. The appellant was the owner of a stallion named Prince Ossian, and for the year 1915–6 an assessment was made upon him under Schedule D in respect of the profits of the stallion. (1) Against this assessment he appealed.

* *Present:* LORD BUCKMASTER, LORD FINLAY, LORD DUNEDIN, and LORD ATKINSON.

(1) Sect. 2 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), provides that the duties thereby imposed "shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules contained in this Act, and marked respectively A, B,

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When a foal Prince Ossian was purchased by the appellant and was reared and fed by him on Dunmore Home Farm as part of the stock of the farm. He was attended to by the ordinary farm servants in the employment of the appellant. The appellant had used the stallion since three years old during the breeding season for the service of agricultural mares in his own possession, and in addition he sold the services of the stallion to owners of agricultural mares who desired to mate their stock with him at varying rates. Many mares were sent to Dunmore to be served by Prince Ossian there, while in other cases the horse was sent under the care of the appellant's servant to the stables of the owners of the mares and service was effected there. The appellant paid for the keep of the horse during the period he was off the farm as well as the wages of the farm servant attending upon him. For the season 1915 Prince Ossian was selected by the Stirlingshire Horse Society to serve mares belonging to the members of that Society, but in addition he also served farm mares belonging to the appellant. The appellant received 2*l.* and 4*l.* as stud fees from the Society for each mare served and proved to be in foal, and in addition an initial payment of 60*l.* from the Society. He admitted that his gross earnings from the horse amounted to 290*l.* One other stallion besides Prince Ossian was used for stud purposes, but it was not dealt with in the case.

The Commissioners were of opinion that the appellant must be assessed upon the profits made by him out of the employment of his stallion in serving mares away from his own farm, and that such profits fell under either the First

C, D, and E, and to be charged under such respective schedules (that is to say)":—

Schedule B: "For and in respect of the occupation of all such lands, tenements, hereditaments, and heritages as aforesaid. . . . ."

Sect. 100 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35). Schedule D: "First Case. Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act."

"Sixth Case. The duty to be charged in respect of any annual profits or gains not falling under any of the foregoing rules, and not charged by virtue of any of the other schedules contained in this Act."

Case or the Sixth Case of Schedule D. It did not appear to the Commissioners that the employment of a stallion in the manner disclosed could be said to fall within Schedule B; the employment of a stallion for stud purposes for hire outside of his own farm was no part of the business of a farmer.

The First Division (The Lord President, Lord Johnston, Lord Mackenzie, and Lord Skerrington) affirmed the determination of the Commissioners.

Condie Sandeman K.C. and *Walter T. Watson* (both of the Scottish Bar) for the appellant.

The profits derived from the use of this stallion are part of the ordinary profits of the farm. Breeding is not a separate trade, manufacture, adventure, or concern in the nature of trade, but is a normal and essential part of the business of a farmer and the hiring out of the services of the stallion is a natural incident thereof. These profits are therefore included in the assessment under Schedule B in respect of the occupation of the farm.

Clyde K.C. (Lord Advocate) and *R. Candlish Henderson* (of the Scottish Bar) for the respondent.

On the facts the profits earned by means of the stallion have no necessary connection with the appellant's occupation of the farm, but are drawn from an independent source of income and are chargeable under Schedule D.

Condie Sandeman K.C. replied.

LORD BUCKMASTER. My Lords, the appellant in this case is a farmer who has a farm at Dunmore. Upon this farm he has a considerable quantity of stock and horses. Among his animals he possesses a stallion known by the name of Prince Ossian; this stallion he has been in the habit of using for the service both of his own mares, six in number, upon the farm and also for the service of the mares of adjacent farmers who desire to get the benefits of the horse. It is not the only stallion which serves his farm; he has another which he also keeps upon the premises. The service of the stallion Prince Ossian, apart from its use in connection with

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the farm, is so much sought for and is of such value that the appellant received in the Income Tax year 1915 the gross sum of 290*l.* in respect of its use. The Income Tax Commissioners sought to assess the appellant to Income Tax upon 250*l.*, part of this sum of 290*l.*, and upon his request a special case was stated raising the question as to whether or no the use of this stallion in the manner that I have described did or did not render him liable for the tax. That special case was referred to the Court of Session for decision, and the judges of the First Division have unanimously decided that the assessment was correct.

The question which arises for determination is one which not infrequently occurs in connection with the Income Tax Acts and in the result depends upon the determination of a simple question of fact. It is well known that by Schedule B of the Income Tax Act of 1853 provision is made for taxation in respect of the occupation of lands in the United Kingdom, and there then follow provisions in Schedule D which secure that further duties under that schedule are to be exacted in respect either of any trade, adventure, or concern in the nature of a trade not contained in any other schedule, or in the case of duties to be charged in respect of annual profits or gains not falling under any foregoing rule. There can be no question, therefore, that these profits are liable to taxation unless it can be properly asserted that they arise for, and in respect of, the occupation of the lands which the appellant holds as his farm.

It is quite possible that an entire horse may be used by a farmer in connection with his farm in such a manner that its use outside will, in relation to its use for his own purposes, be so trivial and unimportant that there would be no tax exigible in respect of profits received for its services; or on the other hand it may be that the real use and purpose of the animal and its real advantage to its possessor lie in the moneys which can be obtained by the use of its services outside. My Lords, this question is essentially a question of fact; the Commissioners in this case have decided that the use by the appellant of this stallion is a use that provides

a profit which does not arise in respect of the occupation of his lands. It is not so found in exact language, but it is found inferentially, and the facts to which I have referred—namely, the number of mares on the appellant's farm, the number of entire horses that he possesses, and the extent of the profits which this horse has earned—are, in my opinion, abundant to justify the conclusion which has been reached.

For these reasons in my opinion this appeal fails and should be dismissed with costs.

LORD FINLAY. My Lords, I am of the same opinion. Every case of this kind really depends upon questions of fact, and very largely in most cases it resolves itself into a question of degree. I see no reason whatever which would justify us in overruling the conclusion at which the Commissioners have arrived, and it seems to me that the appeal must be dismissed.

LORD DUNEDIN. My Lords, I concur.

LORD ATKINSON. My Lords, I concur.

Interlocutor of the First Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, January 28, 1919.

Agents for appellant: *Thorne, Priest & Co., for Guild & Guild, W.S., Edinburgh.*

Agents for respondent: *H. Bertram Cox, Solicitor for England of the Board of Inland Revenue, for Sir Philip J. Hamilton-Grierson, Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

(HOUSE OF LORDS.)

H. L. (E.)* 1919 *Jan.* 27.

THOMSON AND ANOTHER . . . . . APPELLANTS;

AND

MASTER AND FELLOWS OF ST. CATHARINE'S COLLEGE, CAMBRIDGE, AND OTHERS . . } RESPONDENTS.

MASTER AND FELLOWS OF ST. CATHARINE'S COLLEGE, CAMBRIDGE . . . . . } APPELLANTS;

AND

THOMSON AND ANOTHER . . . . . RESPONDENTS.

MAPPIN'S MASBRO' OLD BREWERY, LIMITED . . . . . } APPELLANTS;

AND

THOMSON AND ANOTHER . . . . . RESPONDENTS.

MASTER AND FELLOWS OF ST. CATHARINE'S COLLEGE, CAMBRIDGE . . . . . } APPELLANTS;

AND

DOWAGER COUNTESS OF ROSSE AND OTHERS . . . . . } RESPONDENTS.

Mines—Inclosure Act—Construction—Ownership of Mines and Minerals—Right to let down Surface in working.

A special Act passed in 1814 for the inclosure of lands in three manors, which were dealt with in similar terms, in each case recited that the lords of the manor were "the owners of the soil and waste grounds" within the manor "and of the mines and minerals therein," and directed that a certain portion of the commons and wastes should be allotted to the lords of the manor "as a full and sufficient recompense for their right to the soil" of the commons and wastes, and that the residue should be allotted in severalty among the commoners in full bar and satisfaction of and for their respective rights of common, and saved to all persons (other than those to whom any allotment or compensation

* *Present:* LORD FINLAY, LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

should be made, and except such rights and interests as the inclosure thereby authorized should absolutely require to be barred, destroyed, or extinguished) all such rights and interests in the commons and wastes as they would have enjoyed if the Act had not been made. Excepting the above recital the Act and award were silent as to mines and minerals:—

Held (by Lord Finlay, Lord Dunedin, Lord Shaw of Dunfermline, and Lord Sumner; Lord Atkinson dissenting) that the recital was not sufficient to cut down the ordinary meaning of the word "soil," and that the right to the minerals passed as part of the soil to the allottees of the several allotments.

St. Catharine's College, Cambridge v. *Greensmith* [1912] 2 Ch. 280 and *St. Catharine's College, Cambridge* v. *Rosse* [1916] 1 Ch. 73 overruled.

Held further (by all their Lordships) that as regards the parties to *St. Catharine's College, Cambridge* v. *Rosse* [1916] 1 Ch. 73, in which the Court of Appeal had decided that the lords of the manor were entitled to the minerals under the lands allotted to the commoners, the lords of the manor were not entitled to let down the surface of those lands for the purpose of working the minerals thereunder.

Decision of the Court of Appeal reversed upon the first point and affirmed upon the second point.

THE three consolidated appeals arose out of an action brought by W. A. Thomson and B. W. Peel, allottees of lands formerly constituting part of the waste and commons of the manors of Norton and Askern, under an Act passed in 1814 (54 Geo. 3, c. 136) for inclosing lands in the manors and townships of Campsall, Norton, and Askern, in the county of York, against the Master and Fellows of St. Catharine's College, Cambridge, lords of the manor of Norton, and Mappin's Masbro' Old Brewery, Ltd., lords of the manor of Askern, for declarations that upon the true construction of the Act the defendants (1.) were not entitled to any of the mines or minerals lying under the plaintiffs' lands; and (2.) alternatively were not entitled to sink pits in, or deposit soil on, the surface of the plaintiffs' lands, or to make roads across such surface, or to let down such surface in the course of working mines or minerals under the same or otherwise. The defendants counterclaimed for declarations in the opposite sense.

The parties to the fourth appeal were also parties to a previous action of *St. Catharine's College* v. *Rosse* (1), brought

(1) [1916] 1 Ch. 73.

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by the College against allottees of other lands formerly comprised in the waste and commons of the manor of Norton. In that action the Court of Appeal (from whose decision no appeal was brought to the House of Lords), affirming a decision of Eve J., who followed a decision of Neville J. in *St. Catharine's College* v. *Greensmith* (1), decided the question of the ownership of the minerals in favour of the College, and the present action was brought by the College for a declaration that they were entitled, in the terms of the declaration secondly above stated, to interfere with and let down the surface of the lands allotted to the defendants for the purpose of getting the minerals thereunder.

The "Thomson" action and the "College" action were tried together before Sargant J.

The learned judge held (1.) following *St. Catharine's College* v. *Rosse* (2) that the lords of the respective manors were entitled to the mines and minerals under the lands of the allottees; but (2.) that they were not entitled to sink pits in or deposit soil on the surface of such lands, or to make roads across the surface, or to let down the surface in the course of working such mines or minerals or otherwise; and his decision was affirmed on both points by the Court of Appeal (Swinfen Eady L.J., Bankes L.J., and Eve J.).

The facts and the material provisions of the Act are set out in the judgment of Lord Finlay.

Nov. 29; Dec. 2, 3, 5, 6. *Maugham K.C.* (with him *Dighton Pollock*) for the appellants in the first appeal.

Upon the true construction of this Act the allotments of the commons and waste lands to the commoners included the mines and minerals thereunder. The Court of Appeal, in deciding that the minerals remained in the lord of the manor, treated the question as concluded by *St. Catharine's College* v. *Rosse* (2), which followed a decision of Neville J. in *St. Catharine's College* v. *Greensmith*. (1) It is submitted that those decisions were wrongly decided and that undue weight was given to the recital in the preamble. To treat

(1) [1912] 2 Ch. 280. (2) [1916] 1 Ch. 73.

the word "soil" as excepting mineral rights is to give it a wholly unnatural sense which will not be adopted in the absence of a very strong context, and the language of this preamble is not sufficient for that purpose. *Townley* v. *Gibson* (1) supports the appellants' contention. *Duke of Buccleuch* v. *Wakefield* (2) is distinguishable, for there was there a clear reservation of mines and minerals. The practice in Inclosure Acts of making an express reservation of mines and minerals to the lord of the manor, together with the power of working the same, is so common that the omission of such a clause is good ground for supposing that no reservation of mines and minerals was intended. Moreover, a reservation of mines and minerals without any powers of working is beneficial to no one, and such an intention will not readily be imputed to the Legislature. The respondents must rest their case simply on the preamble, the effect of which is to make the usual reservation clause wholly unnecessary. The Act deals not only with wastes and commons, but with open and common fields, in regard to which no question arises of any reservation of the minerals to the lord, but neither the Act nor the award made thereunder draws any distinction between the allotments of the commons and wastes and the allotments of the open fields. All are allotted in fee simple.

G. J. Talbot K.C. (with *MacSwinney*) for the respondents St. Catharine's College, and *Hon. Frank Russell K.C.* (with *E. E. H. Brydges*) for the respondents, Mappin's Masbro' Old Brewery, Ltd.

In construing an Inclosure Act one starts with the presumption that the Commissioners had no authority to deal with the division of minerals, inasmuch as that is foreign to the purposes of the Act. The preamble of this Act differentiates between soil and minerals in reciting the rights of the lord of the manor, but the appellants' argument gives no explanation of this. The preamble mentions the mines and minerals in the case of the waste and commons by reason of the lord's interest therein, but it omits all mention of them in the case of the open fields because the lord is not interested. The

(1) (1788) 2 T. R. 701. (2) (1870) L. R. 4 H. L. 377.

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scheme of the Act is to provide compensation for certain things and to save all rights for which no compensation is made. The Act does not deal with the mines and minerals under the waste at all; it leaves them where they were. The Act recites that the lord of the manor is owner of properties (*a*) and (*b*). Then it enacts that no person is to be deprived of his property unless compensation is provided, and it provides compensation for (*a*) but is silent as to (*b*). The irresistible inference is that (*b*) is left where it was—in the lord. In determining whether the lord's right to the minerals is gone or remains, the crucial test is compensation. Has the lord been compensated for the minerals? Clearly not in express terms; and unless he gets compensation under the word "soil" in the lord's allotments' clause (s. 28) he is not compensated. But the recital treats "soil" and "minerals" as two separate things, and "soil" in s. 28 is used in the same sense as excluding minerals by force of the recital; and if that clause gives no compensation the saving clause applies. In *Townley* v. *Gibson* (1) there was no context to cut down the primary meaning of the word "soil," which, apart from any controlling context, admittedly includes minerals. Here the context is to be found in the preamble and the general saving clause. The observations of Lord Hatherley and Lord Chelmsford in *Duke of Buccleuch* v. *Wakefield* (2) are directly in point. See also *Pretty* v. *Solly*. (3) This is no unreasonable demand of the lord, for nothing could be more practically inconvenient than splitting up the mines to correspond with the allotments of the waste, many of which are extremely small.

[They also referred to *Ecroyd* v. *Coulthard* (4) and *Finchley Electric Light Co.* v. *Finchley Urban Council*. (5)]

Maugham K.C. replied.

The second, third, and fourth appeals were then heard.

G. J. Talbot K.C. (with *MacSwinney*) for the appellants in the second and fourth appeals, and *Hon. F. Russell K.C.*

(1) 2 T. R. 701.
(2) L. R. 4 H. L. 377, 392, 404.
(3) (1859) 26 Beav. 606.
(4) [1898] 2 Ch. 358, 366.
(5) [1903] 1 Ch. 437.

(with *E. E. H. Brydges*) for the appellants in the third appeal.

Assuming that the mines and minerals are reserved by the Act to the appellants the power to work and get them must also be reserved as a necessary incident; and, inasmuch as it has been found by Sargant J. to be commercially impossible to get the minerals under the lands in question without letting down the surface, the right to let down the surface is also reserved to them by necessary implication. The appellants rely upon the statement of the law on this point by Cozens Hardy M.R. in *Butterley Co.* v. *New Hucknall Colliery Co.* (1) The appellants concede that they can claim only such rights as are strictly necessary to the enjoyment of their property, and since it is possible to work the mines without breaking the surface they do not now claim to sink pits or to deposit soil on the surface. The grant or reservation of a right necessarily involves whatever is necessary to the enjoyment of that right, according to the well-known maxim: "Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit": Sheppard's Touchstone, Vol. I., pp. 89, 100; Co. Litt. 56 *a*; *Pomfret* v. *Ricroft* (2); *Earl of Cardigan* v. *Armitage* (3); *Durham and Sunderland Ry. Co.* v. *Walker* (4); *Rowbotham* v. *Wilson* (5); *Smith* v. *Darby* (6); *Pountney* v. *Clayton* (7); *Proud* v. *Bates* (8); *Ramsay* v. *Blair* (9); *Rogers* v. *Taylor* (10); *Dudley Canal Navigation Co.* v. *Grazebrook* (11); *Butterley Co.* v. *New Hucknall Colliery Co.* (1); *Jones* v. *Consolidated Anthracite Collieries.* (12) No question of compensation arises because the appellants base their claim upon their common law right; compensation arises only where a thing which is otherwise illegal is made legal by Act of Parliament: *Hayles* v. *Pease and Partners.* (13)

(1) [1909] 1 Ch. 37, 46; [1910] A. C. 381.
(2) (1670) 1 Wms. Saund. (1845 ed.), p. 323.
(3) (1823) 2 B. & C. 197, 207, 211.
(4) (1842) 2 Q. B. 940, 965.
(5) (1860) 8 H. L. C. 348, 360.
(6) (1872) L. R. 7 Q. B. 716, 722.
(7) (1883) 11 Q. B. D. 820, 839.
(8) (1865) 34 L. J. (Ch.) 406, 411.
(9) (1876) 1 App. Cas. 701, 703.
(10) (1857) 1 H. & N. 706, 714.
(11) (1830) 1 B. & Ad. 59, 68.
(12) [1916] 1 K. B. 123, 133.
(13) [1899] 1 Ch. 567, 574-5.

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The cases upon ways of necessity are analogous: *Clark* v. *Cogge* (1); *Gayford* v. *Moffatt* (2); *Pinnington* v. *Galland*. (3) The right to let down the surface being in fact necessary for the working of the minerals, it is immaterial whether the parties to the inclosure did or did not know that the minerals could not be worked without letting down the surface: *Dand* v. *Kingscote*. (4) The cases relied upon by the Court of Appeal are distinguishable from the present case, because in those cases it was either assumed or proved or admitted that the minerals could be worked without letting down the surface; and where an alternative mode of working is feasible that mode must be adopted, on the principle of sic utere tuo ut alienum non lædas. On the one hand the grant of the minerals carries with it whatever is necessary for the purpose of getting them; on the other hand the surface must not be destroyed if it can be avoided. The right of support is not an absolute right, but is qualified by the right of the mineowner to do that which is necessarily incidental to the enjoyment of his property: *Duke of Buccleuch* v. *Wakefield*. (5) In *Love* v. *Bell* (6) and in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Society* (7) the decision turned upon the special provisions of the Inclosure Act, and it was assumed that working would be possible without letting down the surface. *Hext* v. *Gill* (8) is adverse to the appellants' contention, and unless distinguishable it is submitted it was wrongly decided on this point.

Maugham K.C. (with him *Dighton Pollock*) for the respondents.

The mines and minerals are left in the lords of the manor because they have not been dealt with by the Act. The right of the lords takes effect by way of exception and not of reservation. They had no right at the time of the passing of the Act to work the mines so as to let down the surface and thereby destroy the rights of the commoners, and their rights are not enlarged by the Act. The analogy of a way

(1) (1605) Cro. Jac. 170.
(2) (1868) L. R. 4 Ch. 133, 135.
(3) (1853) 9 Ex. 1, 12.
(4) (1840) 6 M. & W. 174.
(5) L. R. 4 H. L. 377, 398.
(6) (1884) 9 App. Cas. 286.
(7) [1906] A. C. 305.
(8) (1872) L. R. 7 Ch. 699.

of necessity fails on the facts. The appellants have not established that it is impossible to take out the minerals without letting down the surface, but only that it is commercially impossible.

[They referred to *Duke of Hamilton* v. *Dunlop* (1); *Duke of Sutherland* v. *Heathcote* (2); *Pwllbach Colliery Co.* v. *Woodman.* (3)]

G. J. Talbot K.C. replied.

The House took time for consideration.

Jan. 27, 1919. LORD FINLAY. My Lords, the questions arising on these appeals are as to the property in minerals under allotments made in virtue of an Inclosure Act passed in 1814 (54 Geo. 3, c. 136), for the purpose of enclosing land in the manors of Campsall, Norton, and Askern in Yorkshire, and as to the alleged right to bring down the surface of the allotments by getting the minerals.

It was decided by the Court of Appeal in 1915, in an action brought by St. Catharine's College, lords of the manor of Norton, against Lady Rosse (4), that under this Inclosure Act the minerals under the allotments remained vested in the lord. There was no appeal against that judgment, and it is conclusive as between the parties to it. On December 6, 1916, Thomson and another, being other allottees, brought an action against St. Catharine's College, lords of the manor of Norton, and Mappin's Masbro' Old Brewery, Ltd., lords of the manor of Askern, to have it declared that the minerals were vested not in the lords but in the allottees. On this point judgment was given by Sargant J. in favour of the lords, following the decision in *Lady Rosse's Case.* (4) The plaintiffs in this action also claimed that it should be declared that even if the lords of the manor were owners of the minerals they were not entitled in getting them to damage the surface of the allotment, and there was heard at the same time an action brought by St. Catharine's College against Lady Rosse

(1) (1885) 10 App. Cas. 813.
(2) [1892] 1 Ch. 475.
(3) [1915] A. C. 634, 646.
(4) [1916] 1 Ch. 73.

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to have it declared that the plaintiffs as lords of the manor were entitled in getting the minerals to bring down the surface. On this point Sargant J. decided in both actions in favour of the allottees, holding that there was no right to damage or let down the surface in getting the minerals. On appeal, the Court of Appeal affirmed the judgment of Sargant J. on both points, holding that the lords of the manor were entitled to the minerals, and that they had no right to let down the surface of the allottees' land in getting them. All parties have appealed to your Lordships' House, the allottees asking that it should be declared that the minerals were not reserved to the lords but passed to the allottees under the Inclosure Act, and the lords asking that it should be declared that they are entitled to bring down the surface in getting the minerals.

I shall first deal with the question of the ownership of the minerals. This depends upon the construction to be put upon the Inclosure Act of 1814 as to the three manors above mentioned. The judgments below held that these minerals are vested in the lords of the manors, having been reserved to them by the Act and the award made under it. The allottees contend that the effect of the Act is that they are owners in fee not only of the soil but of everything beneath the surface. The lords contend, on the other hand, that the Act vested in the allottees only the soil apart from the minerals, which are reserved to the lords. The claim of the lords rests on the contention that in the Inclosure Act a distinction is drawn between the soil and the minerals, that the Act shows that the lords received no compensation in respect of the minerals, and that by virtue of the saving clause (s. 66) it follows that the minerals remained vested in the lords.

The recitals in the preamble to the Inclosure Act were much relied on by counsel for the lords of the manor. As regards the manor of Campsall it is recited that the Rev. Edward Frank is lord of the manor of Campsall, "and as such is owner of the soil of the commons and waste grounds there, and of the mines and minerals therein," and as regards the manor of Askern there is a recital of the title

of the lords of the manor in the same terms. It is also recited that the Master and Fellows of St. Catharine's College are lords of the manor of Norton, "and as such are owners of the soil of the commons and waste grounds within that township, and of the mines and minerals therein." There is for the purpose of the present appeal no difference between these recitals, and it is argued on behalf of the lords that they treat soil and the minerals as separate subjects of property. The rights of common enjoyed by various persons over the wastes of these manors are also recited in the preamble. The Act then makes provision for the appointment of Commissioners who are to make division and allotment of the commons and waste grounds within the three manors, and s. 12 provides that when this has been done, all right of common or average to which they were at the date of the Act subject should absolutely cease. The Commissioners were first to allot land not exceeding four acres within each of the manors as public quarries for the purpose of getting stone to repair the highways, and it was provided that "the grass and herbage, and right of improving the soil and surface of the lands and grounds to be set out for public stone quarries" should be vested in the surveyors of highways, the produce to go towards the expense of repairing the highways (s. 17). Then follow provisions as to allotments on the one hand to the lords and on the other to the owners and other persons having rights of common, of portions of the remainder of the commons and waste grounds. The provisions as regards the three manors are in similar terms, and I take for convenience only the provisions as to the manor of Norton. Sect. 28 runs as follows: "And be it further enacted, That the said Commissioners for the Manor or Township of Norton shall set out, allot and award unto and for the said Master and Fellows of Catharine Hall College, as Lords of the Manor of Norton aforesaid, such Part and Parcel of the Remainder of the Waste Grounds and Commons within the Manor or Township of Norton aforesaid, as (Quantity, Quality and Situation considered) shall in their Judgment be equal to One full Eighteenth Part in Value thereof, in lieu of and as

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a full and sufficient Recompense for their Right to the Soil of the said Commons and Waste Grounds in the Manor or Township of Norton aforesaid."

This section is followed by provisions as to allotments in lieu of the tithes to which the land had been subject (ss. 29 and 30), and s. 32 deals with the allotment of the residue of the commons and waste grounds as follows: "And be it further enacted, That the said last-mentioned Commissioners shall set out, allot, and award One Moiety or equal Half Part in Value of the Residue and Remainder of all and every the several and respective Commons or Parcels of Waste Grounds within the same Manor or Township of Norton, unto and amongst the several and respective Owners and Proprietors of Messuages, Cottages, and Tofts within the same Manor or Township, having in respect thereof Right of Common on the said Commons and Waste Grounds respectively, in Proportion to the Number and without regarding the Value of such their respective Messuages, Cottages, or Tofts; and the other Moiety or equal Half Part in Value of such Residue and Remainder of the said several and respective Commons or Parcels of Waste Ground, unto and among the several and respective Owners and Proprietors of any Lands or Grounds whatsoever, having in respect thereof Right of Common on the said Commons and Waste Grounds, situate, lying and being within the said Manor or Township of Norton, in Proportion and according to the Value of such their respective Lands and Grounds, in full Bar and Satisfaction of and for their several and respective Rights and Interests upon the said several and respective Commons or Parcels of Waste Ground within the said Manor or Township of Norton; and that in ascertaining the Value of the several and respective Parcels of Wood Land or Ground within the said Manor or Township, the said Commissioners shall and they are hereby required to estimate the same according to the Nature and Quality of the Soil thereof, as if no Wood was growing thereon." It is unnecessary to set out the corresponding provisions as to the manors of Campsall and Askern.

Sect. 62 makes provision for the award of the Commis-

sioners, and the saving clause (s. 66) is in the following terms : "Saving always to the King's Most Excellent Majesty, His Heirs and Successors, as well in Right of His Crown as in Right of His Duchy of Lancaster, and also to all Persons, Bodies Politic and Corporate, their respective Heirs, Successors, Executors, Administrators and Assigns (other than and except the several Persons, Bodies Politic and Corporate, to whom any Allotment or other Compensation shall be made or provided by virtue of this Act, in respect of the Interest or property for which such Allotment or Compensation shall be made, their respective Heirs, Successors, Executors, Administrators and Assigns, and except such other Rights and Interest as the Intent and Purpose of the Inclosure hereby authorized shall absolutely require to be barred, destroyed, or extinguished, by virtue of this Act) all such Estates, Rights, Title, and Interests, as they, every, or any of them had or enjoyed, of, in, to or out of the said Commons, Wastes, and Open Fields hereby directed to be inclosed, before the passing of this Act, or could or might have had and enjoyed if this Act had not been made."

It is argued for the lords that the compensation by way of allotment was given to the lords solely in respect of their interest in the soil, and that soil in this connection must be understood as denoting the surface and sub-soil exclusive of minerals. If this argument were correct, it would follow that inasmuch as no compensation is given in respect of mines and minerals, these must by virtue of s. 66 remain vested in the lord after the Act as before it. The question whether the compensation is given in respect of the minerals as well as the rest of the property of the lord of the manor must depend on the construction of the sections by which such compensation is given. No light is thrown upon this question by s. 66, which merely reserves the right of all persons to any property in respect of which no compensation is given. It was urged for the lords that s. 66 should be read along with each of the sections providing for the allotments, e.g., s. 28, and should have the same effect as if s. 66 had been set out there in terms as a part of such sections. It is obvious that

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to do so would be to alter the Act. An express incorporation into s. 28 of the words in s. 66 would be a clear indication that there was some right of property not compensated for by s. 28. No such inference can be drawn from the existence of the saving in a separate clause at the end of the Act, which merely reserved to the owner any right of property in respect of which no compensation has been given on the fair construction of the operative clause.

Does s. 28 on its true construction show that the allotment to the lord was in respect of all his rights as before the Act including minerals, or does it show that it was in respect solely of his title to the soil excluding minerals? The allotment to the lords is to be "in lieu of and as a full and sufficient recompense for their right to the soil of the said commons and waste grounds in the manor." The word "soil" is apt to denote the surface and everything above and below it. It is not easy to understand why, if the minerals were intended to be reserved for the lord, this was not expressed, and I read the words of s. 28 as denoting the whole soil including the minerals. If it had been intended that the lord should retain the minerals, one would have expected to find some provision made for the manner in which the minerals were to be worked with reference to the rights of the allottees as surface owners. We have been furnished with lists of Inclosure Acts, relating to places in Yorkshire, passed between 1802 and 1814. Twenty-three of such Acts contain clauses in terms reserving the minerals to the lord and making provision for the working with or without compensation to the surface owners. Twenty-six of such Acts contain no reservation of the minerals. The recitals in the preamble of the Inclosure Act of 1814 seem to me to supply no foundation adequate to support the superstructure of the inference in favour of the lord contended for. It is not contended, and could not be contended, that either in the preamble or in s. 28 the word "soil" can be read as denoting the surface only. The contention is that the word includes all subsoil with the exception of the strata of minerals.

The recitals do not appear to me to do more than make

it clear that the lords' rights as owners of the soil include the minerals, and I read s. 28 and the corresponding sections with regard to the other manors as stating that the lord gets the allotment in lieu of his interest in the whole soil including the minerals. This view of the effect of the Act is confirmed by the fact that it deals with the enclosure not only of the commons and waste of the manor, but also of open and common fields within the manor. These open and common fields belonged in fee to a number of proprietors and the lots were in many cases small and so situate as to be inconvenient for occupation. It is not contended that the allottees of such allotments did not take the minerals under their new lots as they had had them under their lots before the Act. The allotments of the open and common fields under the Act might be exchanged not only for one another but also for allotments of the commons and wastes (s. 43), and it would need some clear indication to justify the conclusion that the allottee was the owner of the minerals in the one case and not in the other. Further, there is no trace of any reservation of the minerals in the allotments made to owners of tithe in extinguishment of their rights. I think the true inference from the terms of the Act read as a whole is that the right to the minerals passed as part of the soil to the allottees of the several allotments. The lords receive their allotments in compensation for the minerals as well as for the rest of the soil, and it follows that s. 66 has no operation with regard to the minerals. The question is one of the construction of this Act, and none of the cases cited throw any material light upon it.

The decision of the Court of Appeal in *St. Catharine's College* v. *Lady Rosse* (1) proceeded on the footing that the recitals in the preamble were "intended to draw a distinction between the different classes of property and interests of the lord of the manor in order that it might be subsequently made plain that the lord of the manor is to be compensated in respect of one of those interests, and that one only therefore was to be extinguished, and the other was to stand outside the Act."

(1) [1916] 1 Ch. 73, 88.

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For the reasons I have given, I am unable to take this view. On the contrary, it appears to me that if it had been intended to make it plain that the lord was compensated in respect only of one of his interests, and that his right in one only, namely, the soil, was to be extinguished, this would have been expressed in plain terms. A dictum of Lord Chelmsford in *Duke of Buccleuch* v. *Wakefield* (1) was a good deal relied on; but in that case there was a clause in the Act (s. 43) expressly reserving the minerals to the lord. It would be an unprofitable task to scrutinize in detail the Inclosure Act, on which that case turned, reading it with s. 43 left out, for the purpose of seeing whether Lord Chelmsford's dictum can be supported. In the present case, the Act of 1814 seems to me to negative the conclusion which the lords seek to draw from the recitals.

In my opinion the decision of the Court of Appeal should be reversed.

The question of the manner in which the minerals may be worked with regard to the effect upon the surface must be considered in the case of *St. Catharine's College* v. *Lady Rosse* (2), as in that case the decision that the minerals belong to the college as lords of the manor was not appealed against, and the College has claimed in one of the actions now under appeal that they are entitled to get the minerals even if this involved the bringing down of the surface. Mr. Talbot in his extremely able argument put the claim of the College in this way. He said that the evidence establishes that the minerals cannot be got without bringing down the surface, that the reservation of the minerals to the lord has the same effect as a grant, and that the grant of the right to the minerals would carry with it the right to do anything necessary to win them. The evidence does establish that the mines could not be worked profitably without bringing down the surface, but the argument that this shows that the reservation of the minerals carries with it the right to bring down the surface appears to me not to have due regard to the effect of the Inclosure Act as a whole. The Act, it is admitted, creates a right of property in the surface which it vests in the allottees, together with all soil

(1) L. R. 4 H. L. 377, 404. (2) [1916] 1 Ch. 73.

not being minerals, and this is the case with regard to Lady Rosse's allotments, where it must be taken—the decision standing unreversed—that the minerals are in the lord. It would be an extraordinary thing if the same Act which created this right of property in the allottees proceeded to destroy the right by giving the lord the right in working minerals to bring the surface down. So to construe the Act would in fact be to enlarge the rights of the lord in respect of the minerals. Before the Inclosure Act he could not work the minerals so as to destroy the rights of the commoners to be exercised over the surface. The argument for the lords' property in the minerals has been that it is reserved as it was before the Act. The right now claimed in respect of the minerals goes far beyond a reservation and would most materially increase the rights of the lord in getting minerals as compared with his rights before the Act.

A great many cases were cited to us in the course of a very interesting argument upon this point. The effect of these authorities seems to me to be on the whole unfavourable to the contention made on behalf of the lords of the manor in this case. Out of the long list of authorities I will mention only three: *Love* v. *Bell* (1); *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (2); and *Butterley Co.* v. *New Hucknall Colliery Co.* (3) As the question is one of the construction of the Act of 1814, I will content myself with quoting from Lord Selborne words which occur at p. 293 of the Report in 9 App. Cas.: "It appears to me that here the principles already mentioned throw, at all events as strongly as before, upon the appellants, the duty of shewing that there are words which dispense, in their favour, with the general rule of law, and give them a right to let down the surface and deprive the surface owner of his ordinary right of support. I can find no such words." I adopt these words with reference to the contention of the lords in the present case. The argument that letting down the surface was a

(1) 9 App. Cas. 286, 293; (1883) 10 Q. B. D. 547.

(2) [1906] A. C. 305; [1904] 2 Ch. 419.

(3) [1910] A. C. 381; [1909] 1 Ch. 37.

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necessary incident to the working of the minerals reserved is outweighed by the consideration that this would be to take away from the allottee a part of that which the same Act conferred upon him. The contention of the lords of the manor in this respect was rejected both by Sargant J. and by the Court of Appeal, and in my opinion their decisions on this point were right and must be affirmed.

As in all the cases other than that of Lady Rosse, in my opinion, the property in the minerals passes to the allottees, the question as to the mode of working them does not arise, but for the reasons I have given in Lady Rosse's case I think the claim unfounded even on the hypothesis that the minerals were reserved to the lords.

I, therefore, think that the appeal of the allottees in respect of the property in the minerals must be allowed with costs here and below, and that the appeals of the lords as regards the manner of working should be dismissed with costs.

My Lords, my noble and learned friend Lord Shaw concurs in the judgment which I have just delivered.

LORD DUNEDIN. My Lords, I concur in the judgment of my noble and learned friend on the Woolsack.

LORD ATKINSON. My Lords, in the view I take, the main questions for decision on this appeal are, first, whether the appellants or the respondents are, under the provisions of the 54 Geo. 3, c. 136, and the award made thereunder, owners of the mines and minerals underlying the appellants' lands and premises; and second, whether the respondents, even if they be such owners, are entitled to work their mines in such a way as to let down the surface of the appellants' lands, causing thereby the flooding complained of, their justification being that they cannot work them commercially or as a commercial proposition, as it is by some of the witnesses styled, without doing so. The phrase "worked commercially" as used in this connection must, I think, mean worked at a profit. So that upon this second point the contention of the respondents amounts, as I hope to show presently, to this,

that the mere fact of their ownership of these mines and minerals authorizes and empowers them to sacrifice the appellants' interests in the manner complained of, simply because in no other way can they realize the profit they desire to reap. I should myself have thought that by one decision of the Court of Appeal forty-six years old, and by at least three more modern decisions of your Lordships' House, such a contention as this was shown to be absolutely hopeless. The applicability of these cases to the facts of the present case has, however, been vigorously questioned, and it has been sought to put them aside by, it appears to me, treating the clear enunciation of the general principles constituting their very pith and marrow as obiter dicta of no binding authority. One must, therefore, examine these decisions at some length.

The first question is more difficult. It resolves itself, I think, into this: whether the property in the mines and minerals underlying the commons and waste lands in the manor of Norton, of which manor the respondents are the lords, passed out of them under the operation of the above-mentioned statute and award to the allottees of those commons and waste lands, or remained vested in them as they had been vested before the passing of that Act. I frame the question in this form designedly, as I do not think any question of reservation of mines and minerals, or grant and re-grant of them arises in the case. They either remained vested in the respondents as owners of the soil unaffected by the statute and award, or they have, by these instruments, been vested in the several allottees of the surface under which they lie in areas corresponding to the areas of the surface allotted to the respective allottees.

In each of the three sections of the Inclosure Act, 54 Geo. 3, dealing with the allotment of portions of the commons and waste lands of each of the three manors Campsall, Askern and Norton to the lord or respective lords thereof, namely, ss. 18, 21 and 28, it is, in identical words, provided that the eighteenth allotted to them respectively, shall be "in lieu of, and as full and sufficient recompense for their right to the soil of the said commons and waste grounds within or in the

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manor." The word "soil" is only used in three other of the sections, namely, the seventeenth dealing with quarries, the twenty-sixth dealing with the allotments to be made to those who, as owners of messuages, cottages, or other grounds, had a right of commonage on the commons and waste lands within the manors of Campsall and Askern, and the thirty-second, by which allotments are directed to be made to similar owners of messuages, &c., having a right of commonage on the commons and waste grounds in the manor of Norton. In the three last-named sections it is, I think, perfectly plain that the word "soil" is used to describe the surface layer of the land upon which grass, herbage, or timber may grow. In the seventeenth section it is provided that parcels of land not exceeding four acres in extent are to be set out to be used as quarries to supply material for the repairing of public and private roads within the three manors, and that the grass and herbage and the right of improving the soil and surface of those parcels shall be vested in the surveyor or surveyors of highways within the manors for the time being, in trust to let the same for the most money that could be made thereof, &c. In the twenty-sixth and thirty-second sections respectively a provision is at the end of each section found to the effect that "in estimating the value of the several and respective parcels of woodland within the manor or township the Commissioners shall, and they are hereby required, to estimate the same according to the nature and quality of the soil thereof as if no wood was growing thereon." It was not contended in argument, it could not, I think, be contended successfully, that though the word "soil" may in itself be adequate to describe a parcel of land from its surface where it meets the air ad inferos it bore that meaning in these sections. It is contended, however, that it does bear that meaning in s. 28 and the other sections dealing with allotments to the respective lords of the manors. The word "soil" is in truth a flexible or ambiguous term, capable, according to the context of the instrument in which it is used, of meaning land from the surface ad inferos, inclusive or exclusive of mineral strata, or the mere surface layer used

for cultivation. Of course, this Inclosure Act must be construed as a whole, each part considered as it bears upon and affects every other, and should its language in any part of it not be clear and unambiguous, one must search in the preamble for a guide to the meaning of the obscure provisions. For as Tindal C.J. said in the *Sussex Peerage Case* (1) in such a state of things, "it has always been held a safe mean of collecting the intention" (i.e., of the Legislature) "to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer" (*Stowel* v. *Lord Zouch* (2)) "is 'a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.'" Well, when one turns to the preamble of the statute, in the present case one finds it recited in reference to each of the three manors that the lords of the manors, "as such, are owners of the soil of the commons and waste grounds within the township or manor" (in the case of the respondents it is the township) "and of the mines and minerals therein." These latter seven words would be quite unnecessary if it was only desired to state that the lords of the manors were owners of the commons and waste lands from the surface ad inferos. The word "soil" would in itself have sufficed for that purpose.

In *Eardley* v. *Granville* (3) Sir George Jessel M.R., in dealing with Lord Campbell's judgment in *Bowser* v. *Maclean* (4), says: "If a freeholder grants lands, excepting mines, he severs his estate vertically, i.e., he grants out his estate in parallel horizontal layers, and the grantee only gets the parallel layer granted to him, and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor. The freeholder retains the mineral stratum as part of his ownership; and whether or not he takes the minerals or subsoil out of the stratum, the stratum still belongs to him as part of the vertical section of the land." Something of this kind would appear to have been in the minds of the framers of this Inclosure Act. They treated the estates of

(1) (1844) 11 Cl. & F. 85, 143.
(2) (1567) Plowd. 369.
(3) (1876) 3 Ch. D. 826, 834.
(4) (1860) 2 D. F. & J. 415.

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the lords of these manors in the commons and waste lands thereof as stratified, divided, as it were, into three separate strata, the mineral stratum, and the strata lying above and below it, and described the mineral stratum as a piece of property separate and apart from the others. In construing this statute one cannot, I think, treat the addition of these words as entirely purposeless, or the words themselves as merely surplusage introduced through ignorance or carelessness. If consistently with the aim, object, and scope of the statute taken as a whole a purpose and effect can reasonably be attributed to them they should be attributed to them.

It is but natural and reasonable to suppose that the Legislature which passed this Inclosure Act should desire to secure for the public the obvious advantage of keeping the vast mineral field which might underlie the commons and waste lands of each of those manors in the hands of one owner, when the entire field could be worked as one mining unit, rather than permit it to be broken up into small segments corresponding in area to the allotments which they underlay, and vest these segments in the allottees as owners in fee. One has only to glance at the award to see the extremely small area of many of the allotments. It does not require any knowledge of mining to see that a mining field of 200 acres would be an entirely different thing in value and productiveness when vested in the hands of one owner from what it would be if vested as owners in forty allottees. At p. 19 of the award, s. 28 of the Act is in effect recited, and 34a. 1r. 26p. of the commons and waste lands of the manor of Norton are allotted to the respondents as lords of that manor "as a full compensation to them for their right in the soil of the commons and waste ground" in it. That might, owing to the rights of the commoners, have been just and adequate compensation for the right of the lords to all the strata comprised on those commons and waste ground other than the mineral stratum; but it is, in my view, almost impossible to believe that it could have been considered adequate compensation for their right to the mines and minerals in addition. For though it is quite true that the minefields underlying the commons and waste

grounds of the different manors had not been worked up to the date when the 54 Geo. 3 was passed, still, all the manors are situated in a mining district only fifteen miles distant from the prolific Barnsley seam, which had been worked from an early date in the eighteenth century. It is difficult to suppose that at the date of this Act the existence of mineral wealth beneath the commons and waste lands of each of the manors was not believed in, or at least hoped for. The amount of the compensation given is therefore a guide to the nature of the interest for which it was given. It would have been easy for the Legislature to have, in simple language, directed that the minerals under the commons and waste lands of each of these manors should be reserved to the lords of those manors. It has not done so. It has, as so often happens, preferred the obscure. And one must construe its language as one best can by looking at what was allotted to the lords of the manors, at the recitals in the preamble, and generally at all the provisions of the Act, as one is bound to do. I have come to the conclusion that the lords of the manor of Norton were compensated for all the strata of the commons and waste lands of their manor other than the mineral stratum, and that they were not compensated for this latter stratum.

I concur in the construction put upon s. 66 of the Act by Lord Cozens-Hardy, the late M.R., in *St. Catharine's College* v. *Rosse* (1), namely, " that except in so far as a person receives compensation under the Act he is not bound by it, but is outside it and is not in any way affected by it," and—may I add?—is not by it divested or deprived of any estate, right or interest for which he does not receive compensation, but that the same remain vested in him as fully and completely as if the Act had never passed. The case of the *Duke of Buccleuch* v. *Wakefield* (2) is, I think, on this point a much stronger one than the present. The twenty-fourth section of the special Act in that case provided that the Commissioner was to set out in two or more plots for the lord of the manor, and " as a compensation for his right and interest in the

(1) [1916] 1 Ch. 73, 82. (2) L. R. 4 H. L. 377, 403.

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moors, commons and wastes thereof one full sixteenth part (quality and situation considered) of the remainder of the said moor," &c. Lord Chelmsford, in his judgment, said in support of appellants' right to the mines, "reliance was placed on the twenty-fourth section of the special Act." He then states in effect the words of the section, and proceeds: "It was argued that the word 'soil' was comprehensive enough to include everything to which the lord was entitled in, over, or under the moors, commons, and wastes. But whatever may be the force of this word, unqualified and unexplained, it cannot have the effect contended for as it is used in the special Act. It is, perhaps, unnecessary to go farther than to the 1st section of the Act for proof of this. It recites that 'The Duchess Dowager of Buccleuch and Queensberry is lady of the manor of Plain Furness, and, as such, is entitled to the soil of all the said moors, commons, and wastes, and to all mines, minerals, and quarries, of what nature or kind soever, within or under the same.' I should have thought, as the soil and the mines are here expressly distinguished from each other, that the 24th clause, considered alone, would have been sufficient to show that the compensation to the lord was confined to his right and interest in the surface soil." Lord Hatherley at p. 392 in effect agrees. I am of opinion that the case of *St. Catharine's College* v. *Rosse* (1) was rightly decided, that the respondents in the present case, as lords of the manor of Norton, are still seised and possessed of the mines and minerals underlying the commons and waste lands of their manors, and that the appeal fails upon this point.

I now turn to the second question, the right of the lords of the manor to deprive the allottees of the support of their allotments by the subjacent mineral stratum. In this case the special Act and the award made under it constitute together what in mining cases is commonly styled the "instrument of severance." By neither the one nor the other of these is any power or authority expressly given to the lords of the manor to let down the surface of the land overlying their mines. Neither

(1) [1916] 1 Ch. 73.

are this power and authority so to do given to them impliedly, unless indeed it be that the mere fact of ownership confers both. There is not in the last half century, I am confident, a single decided case to be found to the effect that the mere ownership of mines and minerals confers any such authority or power. There are many to be found directly to the contrary effect. Mr. Talbot, in his clear, able and forcible argument delivered on behalf of the lords of the manor, skilfully constructed, as I think it was, on the flimsy materials at his command, practically took his stand upon the principle embodied in the familiar maxim "cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit," which by the Master of the Rolls has been freely translated thus, "that where a grant is made that also is granted without which the main grant could not be used," and having, in search of an analogy, made an excursus into the authorities dealing with the grants of rights of way of necessity, put forward, and sought to maintain, this broad and somewhat bold proposition, that the rights of his clients as mineowners so dominated over the rights of the allottees of the land overlying their mines, that these mines might be worked in such a way as to ruin and destroy the allotments if that was the only way in which they could be worked commercially, which, in my view, means worked so as to secure a profit. That proposition was the logical result of his contention. And though the injury inflicted on the allottees' property in the present case may not amount to absolute destruction, I think the lords of the manor ought to be held bound by the proposition so put forward. It is to matter nothing, apparently, that, as appears from the preamble of this Act, the rights of the Commoners were inviolable by the mineowners, that their existence over the commons and waste lands of the manors were considered to be injurious, retarding or altogether preventing the improvement it was plainly the object of the Act to promote, that, in order that these rights might be justly abolished without loss or injury to the commoners, portions of the land subject to them were in lieu of them allotted to the latter to be held in severalty in fee, and from the provisions relating to ditching and draining, &c., contained

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in the Act were apparently intended to be cultivated. Indeed, Lord Selborne says in *Love* v. *Bell* (1): "The very principle of improvement by inclosure is that the land should be improved, to the extent of its capacity, by those persons who have the altered tenure, and who would have an interest in improving it." Notwithstanding that this very statute was passed for the object mentioned, Mr. Talbot contends that it has left his clients, the mineowners, in such a position that their mining rights so dominate the rights of the allottees to the use and enjoyment of their allotments, that they can work their mines in such a way as to destroy the allotments, let down their surface till it is submerged by flood, cover it, if need be, with spoil banks, however thick, if that be the only way of working that will secure a profit. If that were the law then not only would the object and purpose of this Act be defeated, but in addition the allottees would be grossly wronged. Fortunately for the cause of justice it is not the law, as I shall presently endeavour to show. The allottees are not thus placed at the mercy of the mineowners. On the contrary the right of the surface-owner to the support of the subjacent minerals is paramount unless he has been deprived of it by the express or implied provisions of the instrument of severance.

The first case to which I desire to refer is *Hext* v. *Gill*, decided in 1872. (2) There the Duke of Cornwall, as lord of a manor, made a grant in freehold in a copyhold tenement to the copyholder, reserving to himself "all mines and minerals within and under the premises with full and free liberty of ingress, egress, and regress, to dig and search for, and to take, use, and work the said excepted mines and minerals." The deed of grant did not contain any provision for compensation. Under the surface of the land was a bed of china clay, which was held to be a mineral within the meaning of the reservation. It was admitted that this china clay could not be removed without destroying the surface. A Bill was filed by the owner of the surface to restrain the owner of the minerals from thus getting the china clay. This Bill was dismissed by Wickens V.-C. on the ground that the reservation included the china clay and

(1) 9 App. Cas. 286, 295. (2) L. R. 7 Ch. 699, 713.

conferred the power to remove it. That decision was on appeal reversed by Mellish and James L.JJ. on the ground that, though the china clay was included in the reservation, the surface owner was entitled to an injunction to restrain the owner of the minerals from getting at it in such a way as to destroy or seriously injure the surface, because as stated in the headnote "when a landowner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to show clearly that he is intended to have that power." Mellish L.J. lays down the principle of law applicable to such a case in the words following: "Then we come to the important question, whether there is power to get this china clay in the only way in which, according to the concurrent testimony of all the witnesses, it can be got, by a process which utterly destroys the surface of the land. A great number of cases were cited to us upon that point, in none of which was the language exactly similar to that in the case before us, and they must be referred to merely for the purpose of getting a principle from them. Now the cases shew that where the ownership of minerals is separate from the ownership of the surface, prima facie the owner of the surface is entitled to have his surface supported by the minerals. That is not confined, as contended by the Solicitor-General, to the case where the Court has not before it the instrument under which the owner of the minerals derives his rights, but it also applies to cases where the Court has the instrument before it, for the purpose of construing the instrument, to this extent, that prima facie the right to support exists, and the burden lies on the owner of the minerals to shew that the instrument gives him authority to destroy what is described by the judges as the inherent right of a person who owns the surface apart from the minerals." He then proceeds to examine the nature and extent of the power conferred by the reservation clause, and holds that its short and ambiguous words, according to their fair construction, only give a right to create temporary damage, and do not authorize the owner of the minerals absolutely to

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destroy or to cause serious, continuous and permanent injury to the surface. James L.J. expresses his entire concurrence with this conclusion. This case of *Hext* v. *Gill* (1) has been very many times cited with approval. During the course of the argument I asked Mr. Talbot if he could refer to any case where it was disapproved of, or the soundness of the principle it lays down questioned, and his reply was in the negative. I think it clearly establishes that in a case like the present, where no power to work the mines is expressly or impliedly conferred, and the only power to work them is derived from the mere fact of the ownership of them, the surface owner cannot be deprived of the support of the surface to which he is entitled as of natural right. Nor can that surface be destroyed, however necessary both may be for the commercial or other working of the mines.

The next case to which I wish to refer is *Davis* v. *Treharne*. (2) In it an owner of a farm of land leased the same to a lessee for a term of years, reserving to himself all mines and minerals under the land leased, with liberty and power to the lessee "to enter and be upon the said premises to search for, win, and work and carry away the minerals, mines, &c., in or under the land . . . . and do and execute all such other acts, works and things upon, in, or under, or above the said premises as shall be necessary or convenient for working and carrying away the same." The first question for decision upon the appeal was, as stated by Selborne L.C., whether a mining lessee had power to let down the surface as against his lessor. Lord Blackburn, after concurring in the Lord Chancellor's judgment, lays down the law upon the point thus: "I think it must be taken as perfectly settled ground that as of common right the surface land has a right to be supported by subjacent strata of minerals. Although that is common right, it may be shewn—the burden lying upon those who wish to shew it—that the person who has got the surface obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right of

(1) L. R. 7 Ch. 699. (2) (1881) 6 App. Cas. 460, 466, 469.

support from below, in which case of course the owner of the surface could be in no better position than the person who sold it to him. In common right the person who owns the surface has a right to have it properly supported below by minerals, and, if there are mineral workings under the surface, to have a proper support left for it by pillars." Lord Watson restates the rule of law in practically the same terms and expressly mentions that he approves of the decision in *Hext* v. *Gill.* (1) Applying those general principles to the particular facts of the case, judgment was given affirming the judgment of the Court of Appeal, which had affirmed the judgment of Coleridge C.J. in favour of the plaintiff in the action, the surface of whose land had been let down.

In *Love* v. *Bell* (2), as in the present case, the question for decision arose upon an Inclosure Act by which the rights of commonage of the commoners were abolished and allotments were made of the commons and the wastes of the manor in lieu of these rights. It was provided that nothing should defeat the title and interests of the lords of the manor to their royalties, but that they should for ever enjoy all rents, courts, mines and other royalties in as full and ample and beneficial a manner as they could have enjoyed the same if the Act had not passed. And further, that in case the lords or any person should work any mines lying under any allotment they should make satisfaction in damages for the spoil of the ground occasioned thereby. At the time of the Act no custom existed to enlarge or cut down the common law rights of the lord of the manor to work the minerals under the waste of the manor. Many years afterwards, the lord of the manor worked the mines under one of the allotments so as to let down the surface. The allottee brought an action. The House of Lords again laid down the general law upon the subject as it had been laid down by Lords Blackburn and Watson in *Davis* v. *Treharne* (3), and, applying it to the particular facts of the case, affirmed the decision of the Court of Appeal, holding that upon the proper construction of the Act the provision for satisfaction did not

(1) L. R. 7 Ch. 699. (2) 9 App. Cas. 286, 297.
(3) 6 App. Cas. 460.

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apply to subsidence, that there was nothing in the Act giving to the lords the right to let down the surface, and that the plaintiff was entitled to damages. Lord Selborne laid down the rule of law in the passage already cited by my noble friend on the Woolsack.

Lord Watson, after pointing out that the appellants were the mineral lessees of the lord of the manor to whom were reserved by the express terms of the Act all mines within the limits of the waste with power to work the same, said: "The respondents, being thus in right of the surface, are entitled to have it supported by the subjacent strata, unless the appellants can shew that, by the terms of the statutory reservation in their favour, the lords of the manor have the right to let it down, in the course of their mineral workings. The principles of law applicable to a case like the present are, in my opinion, precisely the same as those which govern the mutual rights of the respective owners of the surface and of the minerals below, when the plenum dominium of the land has been split into these two estates, by grants proceeding from a common author."

The case of *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1) is a very strong one. There, before the passing of the Inclosure Act, the lords of the manor had, as is usual, power to work the mines and minerals under the wastes of the manor so as to let down the surface provided enough pasturage was left to satisfy the rights of the commoners. The wastes were, by an Inclosure Act of 1715, enclosed and allotted, and the lord of the manor was empowered to work the mines and minerals under the allotments as fully and as freely as he might have done if the Act had not passed, and that without making any satisfaction therefor. A compensation clause in the Act provided that any damage done to an allottee by the exercise of the lords' powers should be paid by an assessment on the owners of the surface. It was held that, on the true construction of the Act, the common law right of the surface owners to have the surface supported by the underlying minerals was not taken

(1) [1906] A. C. 305, 310, 313.

away either by express words or necessary implication. Lord Macnaghten, after reviewing some of the authorities and referring to many others which had been cited, said: "The result seems to be that in all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication. This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease, or a deed of grant or reservation, or an Inclosure Act or award." And Lord Loreburn, following Lord Selborne, said: "Just as the maxim 'Sic utere tuo ut alienum non lædas' required them to leave sufficient pasturage when the commoners' rights were to have pasturage, so it now required them to leave support when the commoners' rights had been commuted for allotments." The case of *Butterley Co.* v. *New Hucknall Colliery Co.* (1) does not help the respondents in any way.

I have cited these several passages from judgments delivered on different occasions in this House for the purpose of showing how completely and how authoritatively the principles of the law applicable to the second point raised in the respondents' case have been determined. I was surprised to hear Mr. Talbot contend that the case of *Hext* v. *Gill* (2) was the only case against him. Even if that were so it would be a formidable obstacle to overcome, approved of as it has been; but in truth every case in your Lordships' House which I have cited and the many others upon which they are founded are against him, because they all establish that where the mines and minerals in a parcel of land are vested in one person and the rest of the strata in another, the former cannot work his mines so as to let down the surface unless he is expressly or impliedly empowered so to do by the provisions of the instruments of

(1) [1910] A. C. 381. (2) L. R. 7 Ch. 699.

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severance. He must find in those provisions his authority to deprive the surface owner of his natural right to support and not in his anxiety to make a profit. If in the absence of such express or implied authority he should be obliged to leave his mines unworked he must put up with the loss. These enunciations of the general principle of the law are not obiter dicta having no binding effect. They are, in fact, parts of the very essence of the decisions. I am therefore of opinion that the decision of the Court of Appeal that the lords of the manor were the owners of the mines and minerals underlying the commons and waste lands of the manor was right, and should be affirmed, and that their decision that the lords had no right to let down the surface of the allottees' lands as they have done was also right, and should be affirmed.

LORD SUMNER. (1) My Lords, this Inclosure Act deals with areas over portions of which a large number of persons had adverse surface and other rights of various kinds. There was a great and inconvenient intermixture of these parcels. The Act sought to disentangle the confusion, so that whatever each person might thereafter be entitled to he should hold out and out and freed from strangers' rights over it. Accordingly it redistributed the whole tract into parcels discharged from over-riding rights by allocating to the parties interested newly defined portions according to the value or nature of their former interests and by extinguishing the former interests in consideration of these allocations.

It was known that some of the South Yorkshire seams probably extended under this area, but, owing to the steep angle of dip from the outcrop a good many miles to the west, it was certain that they must be at a depth then regarded as too great for working. Further it was thought that working at such a depth would not affect the surface. Minerals like these could be of little value to the lords of the manors, under whose wastes they extended through considerable areas even if held as a whole, but to the owners of smaller parcels—

(1) Read by Lord Dunedin.

and under the Inclosure Act some of the parcels were very small indeed—the minerals under their several parcels could be of no value at all. In such small areas it could never pay to work them piecemeal. As a matter of business the allottees of the newly divided lands would object to take any subjacent minerals, lest they should have to make compensation for them, while the lords might well consent to their severance and exclusion from the Act on the chance of their having a value some day as a continuous block of coal measures.

The scheme, according to which the Act is drafted, is to set out in a preamble all the different kinds of property or rights belonging to the parties affected by the Act and then the operative sections proceed to enact the dispositions to be made and to provide for an award of parcels by the Commissioners appointed. The remarkable thing about the preamble is the recital in the case of each of the three manors dealt with that the lords were entitled to the soil of the wastes and to "the minerals therein," that is in the wastes, a peculiarly needless severance in language of the subject-matters, theretofore unsevered and in the same ownership, if there was nevertheless to be no severance of them in law thereafter under the Act. Throughout the operative sections mines and minerals are never mentioned. All the other rights and properties recited are specifically dealt with and made the subject of allotment and compensation or of surrender and extinguishment. Commoners' rights are surrendered; so are rights over common and open fields belonging to others. Tithe is extinguished. Wastes, now discharged from rights of common, are redivided and allotted, but mines and minerals, though separately named in the preamble, receive no further attention in terms. So far it looks as if mines and minerals under the wastes were intended to be left outside the Act, and to remain as they were. The enactments of the statute must, however, prevail. Is it to be interpreted in accordance with the good sense of the thing as leaving mines and minerals and the rights connected with them where they stood, or are we constrained to read it otherwise?

The sections first to be looked at are those which say what is to be given to the allottees of parcels of the former wastes.

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Sect. 28—the Norton section—will serve as an example. It begins with words which in themselves would transfer the whole parcel awarded and would include in the transfer the mines and minerals, unless they are followed by some exception or reservation: the words are "shall award unto" the College "as Lords of the Manor aforesaid such part and parcel of the remainder of the waste grounds . . . . as shall be equal to one full eighteenth part in value thereof." The residue of the section states for what this allotment is to be compensation; it is "in lieu of and as a full and sufficient recompense for their right to the soil of the said common and waste grounds in the manor." In itself "soil" is said to be a "flexible" word, and nowhere are "flexible" words so out of place as in a statute, but we must do what we can with it. In this Act "soil" occurs nine times; thrice in the allotting sections, 18, 21, and 28; once in the quarry section, where it refers to the surface, the subject of grazing or tillage; twice in connection with the value of the surface divested of its actual vesture of trees and shrubs, and thrice in the preamble, where the word obviously means more than the bare surface and less than the entire subject of property, surface and all below it included; it means everything except mines and minerals. I see no reason why in ss. 18, 21 and 28 "soil" should be given a third meaning, namely, the whole prism usque ad inferos, mines and minerals included, and, if so, it matters little to the argument which of the other two meanings is adopted. This, however, is not conclusive. The statement that an award of part of the waste in fee, discharged of all rights of common, is in full recompense of the right to the surface of the entire waste, which was subject to those rights, or of the entire waste exclusive of mines and minerals is not sufficient to show what the subject of the award is. It only describes the consideration. It may only show that the value of the mines and minerals, belonging to the lord of the manor before the Act passed, was incapable of estimation or was unworthy of any recompense. The saving clause, No. 66, if it is a mere saving clause, of course only applies to save what the other clauses have not already taken away, but it contains exceptions of persons and rights

which may perhaps be read as definitions of the rights which are transferred under the earlier sections and are excepted out of the final saving clause. The effect of such a reading would be to interpret s. 28 for example, and to limit it by incorporating and applying the words of the exception in s. 66 or some of them. Grammatically, this exception is first of "persons" and then of "other" rights. In order to give sense to the word "other" it may be possible to read the excepting part of s. 66 as if it ran: "except (a) the right and interest of the several persons . . . . to whom any . . . . compensation shall be made . . . . by virtue of this Act, in respect of which the compensation shall be made, and (b) such other rights as the intent and purpose of the inclosure . . . . shall require to be barred," thus excepting both these classes of rights out of the saving and impliedly stating that they have been already conveyed or barred respectively. Even if this be done, can those words of exception be used to limit the expressed directions to allot and convey by reference to the words stating for what the property conveyed is compensation? In other words, can s. 66 cut down the words of transfer in s. 28 "shall award such parcel of the remainder of the waste" by means of the later words "as a sufficient recompense for their right to the soil of the said common and waste grounds" so as impliedly to reserve mines and minerals as not being "property for which such allotment or compensation shall be made." My Lords, I do not think this can be done. I have arrived at this conclusion with much reluctance, firstly because it is not in agreement with the views already taken of this Act by Neville J. and by the Court of Appeal, and secondly, because it leaves the peculiar introduction of the mines and minerals in the preamble quite unexplained, and involves the absurdity of supposing that the mines under the waste were considered to be at once worth so much as to be included among the recited subjects of compensation and worth so little as to be awarded piecemeal, often in minute and scattered portions, exactly in the way which would deprive them of any practical value at all.

This conclusion makes it only necessary to decide the

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question raised as to the right to support in the Countess of Rosse's case, but first I wish to guard myself on two points. It seems to have been taken at the trial that, assuming the Act to have severed the mines and minerals in the parcels under consideration, the question of an implied right to let down the surface would arise on proof that it was commercially impracticable to work the mines without letting down the surface, and that the impossibility of working without letting down was to be considered on the assumption that all or at least large parts of the mines under the old waste are worked together, and not merely the minerals under the particular parcel belonging to the parties whose surface is let down. I should desire to reserve my opinion on these points in case they should arise for decision. With the progress of invention, with a rise in the price of coal or a fall in wages, what is commercially impracticable to-day may be feasible to-morrow, but the implication of a grant has to be made once and for all. Again, the reasoning, which implies an ancillary reservation of physical means of access to the thing reserved, does not necessarily extend to reservation of the means of making money out of it. Lastly, it is not obvious that the grantee of a particular parcel must submit to an onerous reservation out of it, not on account of anything peculiar to himself and his parcel, but because of the necessities of other parcels with which he has nothing to do, although they happen to be adjacent to his own. The evidence did not prove that the minerals under small parcels of this area, taken separately, could not be mined without letting down the surface, though of course it would not pay to try. I think the witnesses admitted the contrary, but at any rate the burden of proof was on the mineowners, and they did not discharge the onus as to this.

In the Countess of Rosse's case it is res judicata that since the awards were made the mines and minerals under the former wastes have always been vested in the lords of the manors and their successors in title. I confess I feel the strain of having to read an Act, which is before me in black and white, as if it said something which I think I can see for myself that it does not say. The most, however, that can be said is that the

Act must now be deemed either to reserve the mines and minerals out of the portions of the waste, which it authorizes the Commissioners to award to allottees, or to authorize them to parcel out and award the surface of the former waste only, leaving the subjacent strata unaffected by and outside the operation of the Act. There the res judicata ends. What the law will imply from such an enactment as to the right of support to the surface from subjacent strata remains to be determined, and is essentially a question of construction of the Act as a whole. Whatever be the true scope of the maxim "cuicunque aliquid conceditur," &c., the language and intent of the instrument under construction must control its application. The question only arises, if the effect of the Act is to reserve the mines and minerals with the effect of a new grant, investing the former owner with this part of his former property on terms different from the terms on which he held it before, since it is clear that if the mines and minerals are simply left outside the Act and in regard to them all things remain as they were, their owners remain bound as they were before to give the surface the benefit of the natural support, which the minerals afford. Now where new grants are brought about by allotment under the Act I think it is clear that the paramount intent of the whole transaction is to liberate all new allotments from that subjection to the rights of others, which had hampered the full enjoyment of the rights of the owners in the unenclosed lands, and to ensure that the allottees shall have plenary enjoyment of their own though they receive areas altered and diminished. The construction contended for produces a diametrically opposite result. The enjoyment of the new allottees of the parcels of the surface awarded to them is upon this construction certainly precarious and possibly illusory. That a century has passed without any question of winning the minerals is an accident. In law, according to this view, a sanguine mineowner might have proceeded to let down the surface as soon as the awards had taken effect because he had a longer sight for profit than his contemporaries, or a capricious one might have done so because he chose to do what he would with his own. Since the application of the rule of construction

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denoted by this maxim would defeat the main object of the enclosure of the wastes, I think it is as clearly negatived as if this had been done by the Act itself in express terms.

Accordingly, I think that the first appeal succeeds, and that the cross-appeal and the appeal in the Countess of Rosse's case fail.

THOMSON AND ANOTHER *v.* MASTER AND FELLOWS OF ST. CATHARINE'S COLLEGE, CAMBRIDGE, AND OTHERS.

Order of the Court of Appeal reversed and judgment entered for the plaintiffs. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

MASTER AND FELLOWS OF ST. CATHARINE'S COLLEGE, CAMBRIDGE *v.* THOMSON AND ANOTHER.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

MAPPIN'S MASBRO' OLD BREWERY, LIMITED *v.* THOMSON AND ANOTHER.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

MASTER AND FELLOWS OF ST. CATHARINE'S COLLEGE, CAMBRIDGE *v.* DOWAGER COUNTESS OF ROSSE AND OTHERS.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Jan. 27, 1919.

Solicitors for Thomson and Another: *Merriman, White & Thomson.*

Solicitors for St. Catharine's College: *Cooper & Co. for Davies, Sanders & Swanwick, Chesterfield.*

Solicitors for Mappin's Masbro' Old Brewery: *King, Wigg & Brightman, for Broomhead, Wightman & Moore, Sheffield.*

Solicitors for the Dowager Countess of Rosse and Others: *Emmet & Co., for Claude Leatham & Co., Wakefield, and Frere, Cholmeley & Co.*

[PRIVY COUNCIL.]

MINISTER OF JUSTICE FOR THE DOMINION OF CANADA . . . } APPELLANT;

AND

CITY OF LEVIS . . . . . RESPONDENTS.

J. C.*
1918
Nov. 25.

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC.

Canada (Quebec)—Municipal Water Supply—Dominion Government Building—Implied Obligations—Taxation—British North America Act, 1867 (30 & 31 *Vict.* c. 3), *s.* 125—*Cities and Towns Act* (*R.S.Q.*, 1909), *arts.* 5651, 5729.

Although by the British North America Act, 1867, s. 125, and the Cities and Towns Act (R.S.Q., 1909), art. 5729, property of the Dominion Government is exempt from taxation, there is an implied obligation on the Dominion Government to make a fair and reasonable payment for water supplied by a City Council under the latter Act for use in a Dominion Government building. There is also an implied obligation upon the City Council to supply water to the building if, and so long as, the Government are willing to pay a fair and reasonable sum. In ascertaining the sum payable the charges imposed upon the owners and occupiers of taxable property for water supplied is a factor to be considered.

APPEAL by special leave from a judgment of the Superior Court of Quebec in review (January 31, 1917), affirming the judgment of Lemieux C.J.

The appellant on July 6, 1916, commenced proceedings against the respondents by petition in the Superior Court, asking for a mandamus to compel the city to supply water to a Dominion Government building. The respondents by their answer repeated an offer, which they had previously made by letter, to supply the building for 300 dollars a year. The facts and the relevant statutory enactments appear from the judgment of their Lordships.

At the trial, which took place before Lemieux C.J., the evidence was chiefly directed to the amount fairly payable having regard to the cost of the municipal waterworks and the charges imposed upon taxable owners and occupiers. The appellant contended that, if there was an enforceable

* *Present:* LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

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obligation upon the Crown to pay, an annual sum of 35 dollars already offered was sufficient.

The Chief Justice held that the city was entitled to charge the Crown on a quantum meruit for the water supplied, and that 300 dollars a year was a fair amount; he accordingly dismissed the petition.

The Superior Court sitting in review dismissed an appeal. The learned judges (Cannon, Dorion, and Désy JJ.) said that the 12½ per cent. on the assessed value, payable under the city by-law, partook of the double character of a tax and a water rate, and that although the Government was exempt from taxation they were liable to pay a proper price for water supplied; that the Government could be required to pay the charge of 12½ per cent., but that in any event 300 dollars, which was less than 12½ per cent., was a proper price to charge.

1918. Oct. 28, 29. *Hon. F. Russell K.C.* and *T. Mathew* for the appellant. The charge of 12½ per cent. upon the assessed value is imposed by art. 43 of the city's by-law of January 3, 1907. That charge is not dependent upon the quantity supplied and is a tax; it is so described in the article imposing it. The imposition of taxation upon Dominion property is prohibited both by s. 125 of the British North America Act, 1867, and by art. 5729 of the Cities and Towns Act (R.S.Q., 1909, tit. XI., c. 1). There was no power to cut off the supply in this case. The only power to discontinue the supply is that given by art. 47 of the by-law upon a failure to pay the tax which could not be imposed upon the building in question. The Dominion by availing itself of the supply did not impliedly agree to pay the tax because by art. 5657 of the last-named Act the city was bound to introduce the water into the building, and art. 28 of the by-law shows that after it was introduced the occupiers were entitled to the supply though without any guarantee as to quantity. The water had to be supplied to the building on the terms that there was paid such sum as appeared proper to the Dominion authorities, unless there was an express agreement by them to pay a definite sum; in the latter case the remedy

was by petition of right. The sum of 35 dollars offered by the appellant was sufficient for the water actually supplied. The finding of the trial judge as to the fair amount was improperly based upon the 12½ per cent. tax.

P. O. Lawrence K.C. and *Owen Thompson* for the respondents. The obligation upon the city under the Cities and Towns Act and under the by-law is merely to introduce the water into buildings, there is no express obligation to supply water. Under arts. 5656 and 5657 and the by-law there is an implied obligation to supply, but only to supply those who are liable to the 12½ per cent. tax. The appellant must be taken to have agreed impliedly that a fair sum should be paid for the quantity supplied. Art. 5727 (2.) impliedly recognizes that the proprietors and occupiers of Dominion property are liable to pay "for the use of water." The trial judge heard expert evidence, and the finding that 300 dollars was a fair sum was properly arrived at.

F. Russell K.C. replied.

1918. Nov. 25. The judgment of their Lordships was delivered by

LORD PARMOOR. This is an appeal by special leave, by an Order in Council of November 27, 1917, from a judgment of the Superior Court of Quebec in review, affirming a judgment of the Superior Court of Quebec, which dismissed a petition of the appellant for an order of mandamus against the respondents.

The City of Lévis, in pursuance of powers which it possessed, constructed a system of waterworks and drainage in 1904 at a cost of about 500,000 dollars. The Council of the City had authority, originally, by ss. 396 and 398 (sub.-s. 3) of the Cities and Towns Act, 1903, and afterwards under the Cities and Towns Act, R.S.Q., 1909, arts. 5651 and 5653 (par. 3), to impose by by-law a special tax with the object of meeting the interest on the sums expended in construction of waterworks, &c., and of establishing a sinking fund, and in addition to establish a rate for water. By art. 5655 it was provided that both the special tax and the water rate, as well as all

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other taxes due for water, or for meters, were to be levied in accordance with the rules and in the manner prescribed for general taxes. On January 14, 1904, the Council of the City provided by by-law for the imposition and levy of a special annual tax not exceeding 17,000 dollars on the assessed value of every house, shop, or other like building, to meet the interest on the sums expended on the construction of waterworks, &c. On January 3, 1907, the Council of the City made a further by-law imposing an annual tax of 12½ per cent. on properties of the annual value of 50 dollars and upwards, and of 7½ per cent. on properties of the annual assessed value of less than 50 dollars, appearing on the assessment roll. The said by-law contains a provision that the taxes thereby imposed shall be payable before any water has been supplied at the office of the City Treasurer in two instalments on October 1 and April 1, or at such other times and in such other manner as the Council shall think right to fix and declare.

The Government of Canada is the owner of a building situate at the corner of Commercial Street and the Avenue Laurier within the area served by the respondents' system of waterworks and drainage. The building was erected in or about the year 1906, and in the first instance was occupied as a Post Office. In 1907 an agreement was made between the Government of Canada and the respondents by which it was provided that the Government would pay the sum of 250 dollars per annum in respect of the water supply to the Post Office, but would not make any payment in respect of drainage. Subsequently further portions of the building were occupied for the purpose of an office of Customs, and an office of Inland Revenue, and a question arose as to the additional payment which should be made by the Government of Canada for the supply of water to these offices. Ultimately the respondents offered to supply water to the new offices for an inclusive sum of 50 dollars a year, in addition to the agreed sum of 250 dollars a year for supply to the Post Office, making a total charge of 300 dollars a year, but the Government, without admitting any liability to pay, insisted that the sum of 35 dollars a year would be a fair sum to charge for the water

supply to the whole building. Their Lordships see no reason to question the finding in the Superior Court, confirmed by the judgment of the Superior Court in review, that 300 dollars did not constitute an excessive demand. No arrangement was made as to the sum which the Government of Canada should pay for the supply of water to the Government building, and on or about February 16, 1916, in default of the acceptance by the Government of the arrangement proposed by the respondents, the respondents cut off the water supply from the Government building. The express power given by art. 5661 of the Cities and Towns Act, 1909, is: "If any person . . . . refuses or neglects to pay the rate lawfully imposed for the water supplied to him . . . . the municipality may cut off the water and discontinue the supply as long as the person is in default." By letter of June 22, 1916, the respondents offered to supply the whole of the Government building with water and drainage on terms that the Government should pay the arrears, then unpaid, of the sum of 250 dollars a year and interest, and that the question of payment for the water supply and drainage for the whole of the building should be agreed within four months, or, in default of agreement, that the respondents should be entitled to cease to afford a water supply from the system of waterworks. This offer was not accepted by the Government.

The appellant in July, 1916, presented a petition for a writ of mandamus to order the respondents to supply water to the whole of the building and at the same time deposited in Court the sum of 250 dollars to answer the charge for the supply of water to April 30, 1916. The appellant claims that he is entitled to an order for a mandamus on the ground that the respondents are under a legal obligation to supply the Government building with water without exacting any annual tax in respect thereof or any payment at all, or (alternatively) any payment other than such as the parties may agree, or in default of agreement such as may be a fair payment having regard to the quantity of water from time to time consumed, and that the respondents had no right to cut off the water supply as the appellant had not refused or neglected to pay

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any rate lawfully imposed on him. The respondents do not claim to be entitled to impose on the Government of Canada any tax, in respect of a supply of water or drainage to the Government building, or any portion thereof. They admit that the Government is free from all liability to taxation, but claim that the water supplied is in the nature of a merchantable commodity, and that, though the Government is free from all taxation, it is not entitled to claim a supply of water without payment, or to continue to receive it without payment, but that it is bound, if and so long as it requires a supply of that commodity, to pay therefor a fair and reasonable sum.

The first question which arises for the decision of their Lordships is whether the Government of Canada is entitled to demand a supply of water from the waterworks of the respondents without payment. Sect. 125 of the British North America Act, 1867, relates only to exemption from liability to taxation, and the respondents do not claim to impose any charge in the nature of a tax. The appellant bases his claim for exemption of payment for water supplied to Government buildings on art. 5729 of the Cities and Towns Act, 1909. That article exempts from taxation the property of the Federal and Provincial Governments of Canada and also certain other property, held and occupied for the purpose for religion, education, or charity. The proprietors or occupiers of property of the latter class are, however, taxable for any special tax or assessment made for the purpose of works required for the opening and maintenance of streets, watercourses and public lighting under the by-laws, as well as for the payment for the use of water. It was argued that the expression of this special liability to pay for the use of water, in the specified instances, gave rise to the implication that there was no liability on the Government of Canada to pay for the use of water as supplied to Government buildings. The language of the article does not justify any such inference. The article places a limitation on the general exemption as applied to certain specified properties. In respect of these properties a special tax or assessment is imposed in respect of works required for the opening and maintenance of streets, watercourses, &c.,

under the by-laws as well as for the payment of water, but the respondents do not claim to impose any tax or assessment on the Government of Canada for the payment of a water supply. The article does not in any way affect the question of the liability of the Government of Canada to make some payment for the water which the respondents supply to the municipality. Water supplied at the cost of the municipality from artificially constructed waterworks is in the nature of a merchantable commodity, and their Lordships are of opinion, that unless some statutory right is established, the Government of Canada cannot claim to have a supply of water for the Government building, unless it is prepared to pay and to continue to pay in respect thereof a fair and reasonable price. The Chief Justice states in his judgment that this obligation has been recognized throughout the whole Dominion, and the correspondence which has passed between the Government of Canada and the respondents in the present case indicates that the main contention which has arisen is not a claim to have water supplied without payment, but as to the amount which, under the conditions, would be a fair and reasonable price.

The question remains to be considered whether the appellant is entitled to the order for mandamus which he claims in his petition. There is no article which in terms imposes upon the respondents an obligation to give a water supply to any of the houses or other buildings within the area of supply, and there is an absence of any general provision either as to the method or system of supply, or as to the quality of the water. The appellant, however, relies on an implication to be inferred both from the articles, and from the conditions which apply where water is supplied from statutory waterworks, that all owners or occupiers of houses or other buildings within the area of supply are entitled to demand a supply of water from the respondents. In all cases in which the owners or occupiers of houses or other buildings, within the area of supply, are so entitled, it is specially provided by art. 5657 that the water supplied shall be introduced into houses or other buildings by and at the expense of the municipality.

In the case of the owners or occupiers of taxable property,

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there is a general obligation imposed upon all such owners or occupiers to pay the special tax imposed, although not availing themselves of the water from the waterworks (art. 5652). It is a reasonable implication that, in return for this liability, the owners or occupiers of taxable property should have the right to demand a water supply, in respect of such property. There are, moreover, provisions in the by-laws which define the conditions attached to such right. Article 43 of the by-law of January 3, 1907, provides that taxes imposed under the by-law shall be payable before any water has been supplied at the offices of the City Treasurer. Article 47 of the same by-law directs that in every case of non-payment of taxes, charges or compensation, imposed by this by-law, within 30 days of their accruing due, the Council or their authorized officer may discontinue the supply of water in any building for which such charges or compensation are due, or to any person who makes default in payment of the said taxes, charges, or compensation. It is further provided that the discontinuance of the supply of water shall not prevent the liability of the owner or occupier to pay the taxes, charges, or compensation, and that the supply of water to a person in default shall not be renewed, until all arrears have been paid. These articles are clearly framed on the basis of an obligation to supply, and their Lordships cannot doubt that this obligation is imposed on the municipality in respect of taxable properties within the area of supply, although no monopoly of supply, which would prevent any owner or occupier from providing an independent supply, has been vested in the respondents. These articles, however, do not apply to the Crown, or to any person requiring a supply of water who is not the owner or occupier of taxable property, and the respondents cannot rely upon them to justify their action in cutting off the water supply from the Government building.

In the case of the Crown no implication of an obligation upon the respondents to give a water supply can be based on liability to water taxation, since the Crown is admittedly not liable to such taxation. The respondents, moreover, have not the monopoly of water supply, so that the implication of an

obligation cannot be supported on the ground that the Government of Canada has been deprived of the right to supply water to the Government building. It must be recognized, however, that water is a matter of prime necessity, and that, where waterworks have been established to give a supply of water within a given area for domestic and sanitary purposes, it would be highly inconvenient to exclude from the advantages of such supply Government buildings, on the ground that these buildings are not liable to water taxation. The respondents are dealers in water on whom there has been conferred by statute a position of great and special advantage, and they may well be held in consequence to come under an obligation towards parties, who are none the less members of the public and counted among their contemplated customers, though they do not fall within that class who are liable to taxation, and who being in the immense majority are expressly legislated for and made subject to taxation. Their Lordships are therefore of opinion that there is an implied obligation on the respondents to give a water supply to the Government building provided that, and so long as, the Government of Canada is willing, in consideration of the supply, to make a fair and reasonable payment. The case stands outside of the express provisions of the statute, and the rights and obligations of the appellant are derived from the circumstances and from the relative positions of the parties. The question, therefore, arises whether the respondents have made any such default in their obligation to supply water to the Government building as would entitle the appellant to an order for a mandamus.

The facts show that the respondents have not refused to supply water provided that the Crown is willing to pay a reasonable amount. An arrangement was made in 1906 under which the respondents supplied water to a portion of the Government building used as a Post Office in consideration of an annual payment of 250 dollars. This arrangement remained in force over a series of years, but an additional payment was subsequently claimed when the rest of the building was used as an office of Customs and Inland Revenue. After negotiation, the respondents offered to supply the whole building for

J. C. 1918 DOMINION OF CANADA v CITY OF LEVIS.

an annual payment of 300 dollars, but Mr. P. Hearson Gregory, writing on behalf of the Government, declared that the proposed charge was absolutely absurd and repeated a former offer, without prejudice, that a flat rate be entered into, for the whole of the service of the building, at 35 dollars per annum, as a sum in every way fair for the amount of water consumed. The Superior Court of Quebec, and the Superior Court in review, have found that the sum claimed by the respondents, and which the Crown was not willing to pay on the ground that it was absolutely absurd, was not excessive having regard to all the conditions, and the charges imposed on the owners or occupiers of taxable property. The result is that at the time when the petition was presented for an order for mandamus the respondents were not in default, since the Government of Canada at that time was not willing to pay a price for the supply of water which had by a concurrent finding of two Courts been held not to be excessive. The respondents were therefore no longer bound to supply a commodity for which the appellant as their customer was no longer willing to pay, and equally they were entitled to discontinue the supply, not as an exercise of an express power to cut it off, but as an implied correlative right, arising because the appellant was no longer prepared to perform his reciprocal obligation. Their Lordships concur in the judgment of the Superior Court of Quebec, confirmed by the judgment of the Superior Court in review, that the order for a mandamus should under these circumstances be discharged.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

THE TURUL.

J. C.*
1919
Jan. 16.

ON APPEAL FROM THE PRIZE COURT, NEW SOUTH WALES.

Prize Court—Enemy Ship—Outbreak of War—Seizure in Port—Days of Grace—Force Majeure—Hague Convention No. VI., art. 2.

Upon the outbreak of war an enemy ship was seized in a port of New South Wales; her papers and charts were removed, and a watchman placed on board. After the seizure a proclamation was made granting enemy ships a period in which to depart. The master was not informed by the proclamation, or otherwise, that upon his applying for a pass the ship would be put in a position to depart:—

Held, that the ship was unable to leave by "circumstances beyond its control" (force majeure), within the meaning of art. 2 of the sixth Hague Convention, and consequently was not liable to condemnation.

APPEAL from a judgment of the Supreme Court of New South Wales (in Prize) dated September 17, 1917.

The above-named Court having rejected a motion by the Procurator-General for a decree condemning the Austro-Hungarian steamship *Turul*, the Procurator-General now appealed.

The facts appear from the judgment of their Lordships.

1919. Jan. 16. *Sir Ernest Pollock S.-G.* and *Pearce Higgins* for the appellant.

Sir Erle Richards K.C. and *Van Breda* for the respondents (owners).

The judgment of their Lordships was delivered by

LORD SUMNER. In this case His Majesty's Procurator-General moved the Court below—the Supreme Court of New South Wales (in Prize)—for a decree condemning the Hungarian ship *Turul*, and that the motion was refused. The Crown now appeals.

The *Turul* arrived at Port Jackson with cargo for Sydney and Newcastle on August 7, 1914. War was declared by His Majesty upon the Austro-Hungarian Empire on August 12,

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, LORD STERNDALE, and SIR ARTHUR CHANNELL.

J. C. 1919 THE TURUL.

and the *Turul* was seized in prize on the 13th. Her ship's papers were taken away, and she was also deprived of her charts. On the 15th a proclamation was issued in order to fix those days of grace which are declared by art. 1 of the sixth Hague Convention to be desirable, and, by the terms of that proclamation, the paragraphs of it which are now material came into effect if and when one of the Ministers of State was satisfied of certain matters and had taken certain steps, of which publication in the Commonwealth Gazette was one. Though there is no evidence upon the subject, the whole case has proceeded upon the assumption that the Minister was duly satisfied, and that those formal steps were taken, and that thereupon the articles in question came into full force and effect, and their Lordships think it unnecessary to pursue this point.

By the terms of the proclamation, from and after its publication "no enemy merchant ship shall be allowed to depart, except in accordance with the provisions of this Order." Then, arts. 3 to 8 having come into force, art. 3 says that "Subject to the provisions of this Order, enemy merchant ships which—(i) At the date of the outbreak of hostilities were in any port in which this Order applies . . . . shall be allowed up till midnight on Saturday, the 22nd day of August, 1914, for loading or unloading their cargoes, and for departing from such port." As a matter of fact the *Turul* was allowed to discharge, and when her discharge finished, which was on August 20, she was directed to be moved to another part of the harbour, and there a watchman was put on board either on behalf of the Marshal of the Prize Court or on behalf of the Customs Officers who had seized the ship. It appears to be immaterial to decide which was the case.

On August 22 at midnight the days of grace expired. Now, the question is whether this ship "Par suite de circonstances de force majeure, n'aurait pu quitter le port ennemi pendant le délai visé à l'article précédent" within the terms of art. 2 of the Convention. If that was so, then she could not be confiscated, and the order made by the Court below was

right. It is clear that the vessel could not leave the enemy port within the period contemplated in the preceding article unless, among other things, her ship's papers and charts were returned to her, and the watchman was removed. Acts had been done in exercise of the belligerent rights of the Crown, which in themselves perforce detained the vessel and which the vessel in herself was powerless to undo, and the only ground upon which it can be said that she was not subject to force majeure during the period down to midnight of August 22 is that the authorities had decided, and by virtue of the proclamation had made known their decision, that these acts would be undone at the request of the captain of the vessel if he chose to avail himself of the opportunity given by the proclamation, and to assert the conventional rights secured by the Hague Convention.

The view their Lordships take of the proclamation is that the terms of it did not constitute an intimation to the captain that upon his choosing to avail himself of the days of grace, to apply for a pass, and to intimate what his port of destination was, so that its name might, if approved, be inserted in the pass, he would then without difficulty, and without risk of refusal, have his charts and his ship's papers returned to him, and have the watchman withdrawn, so that he would be free to leave by midnight of the 22nd. It is to be remembered that a proclamation of this kind may operate in favour of the belligerent who publishes it, since it may be used to diminish, by limiting them, the advantages which the Convention was intended to secure to the enemy ship, for by its publication the belligerent Power defines the number of the days of grace—" délai de faveur suffisant "—and determines also some at any rate of the terms upon which the exercise of the privilege is to be enjoyed. Their Lordships think that the language in which the Crown exercises the right of defining this period of grace within the article ought to be explicit and unambiguous, and explicit and unambiguous with reference to the party, whose opportunity of availing himself of the benefits of the Convention is to be affected by the operation of the proclamation upon his particular

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case. It would ill become a Sovereign Power, and would ill become a Court of Prize adjudicating upon the rights of others as against the officers of that Sovereign Power, to seek to give effect to a proclamation which was less than clear, in order to curtail the advantages which the Convention was intended to secure to a ship which finds itself in its enemy's port. There was, in their Lordships' view, nothing that sufficiently stated to the persons interested in this ship that the seizure, the removal of the papers and the charts, and the custody given to the watchman, were all matters which were intended to be covered by the general terms employed in the proclamation, and that this ship, in spite of these particular circumstances, would be allowed to depart within the limited time merely by virtue of the general terms of the proclamation. If the captain of the vessel had had the opportunity of departing, and had for reasons of his own decided not to avail himself of it, as, for example, because he could not sail without coals and could get no money to procure them, or that he was not sufficiently confident that a British passport would protect him from capture by vessels belonging to His Majesty's Allies, then it has been settled that in such a case it is his own choice—it may be also his own misfortune—that detains him in the port, but the ship is liable to be confiscated, because it cannot be truly said that force majeure is what has prevented his taking advantage of the opportunity. There was some evidence upon which such a finding might have been arrived at, but the learned judge in the Court below did not act upon that evidence, and their Lordships do not see their way to any finding of fact at which he did not arrive. They therefore think that he rightly refused to confiscate the vessel.

As to the other point, that the matter was already decided by the decree dated November 2, 1914 (1), their Lordships think that it is unnecessary to express any opinion, since,

(1) On November 2, 1914, the Prize Court had made a decree declaring the ship "to have been seized under such circumstances as to be entitled to detention in lieu of confiscation," and ordering that she be detained "until further order." The respondents contended that by the decree there was a res judicata in their favour.

whatever the intention of that decree may have been, the result would only be to arrive at the same conclusion—namely, that the appeal fails. J. C. 1919 THE TURUL.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *William A. Crump & Son.*
Solicitor for respondents: *Treasury Solicitor.*

[PRIVY COUNCIL.]

SOUTH AUSTRALIAN BREWING COMPANY, LIMITED . . . . . } APPELLANTS; J. C.* 1919 *Jan.* 21,

AND

HILL . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Australia—Landlord and Tenant—Covenant—Liability to Land Tax—"Except the Land Tax"—Land Tax subsequently imposed—(Federal) Land Tax Assessment Act (No. 22 of 1910), s. 30.

The owner of premises in South Australia demised them in 1895 for a term of thirty years, the lease containing a covenant that the lessees should pay all taxes which had been or might be imposed on the lessor or the lessees in respect of the premises "except the land tax." At the date of the lease there was a South Australian State land tax payable by owners, the incidence not being transferable to a lessee unless the tax was specifically mentioned in the covenant. The Commonwealth of Australia was constituted in 1901, and a further land tax was first imposed by Federal legislation in 1910. That tax was made payable by owners, it being provided by the Land Tax Assessment Act, 1910, s. 30, that "a covenant in a lease imposing on a lessee the obligation of paying taxes on the land," if in a lease made before the Act, "shall not be valid to impose on the lessee the obligation of paying the land tax to any greater amount than the amount (if any) which would have been payable by the lessee if he had been owner of the land included in the lease and of no other land":—

Held, that the liability on the lessees under the covenant to pay the Federal land tax was not excluded by the exception, and that they were liable to the extent provided by s. 30 above mentioned.

* *Present:* LORD BUCKMASTER, LORD PARMOOR, and LORD PHILLIMORE.

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APPEAL from a judgment of the Supreme Court of South Australia (July 24, 1917).

The respondent brought an action against the appellants in the Court above mentioned claiming a declaration that, according to the true construction of a lease dated April 11, 1895, the appellants were liable to pay so much of the Federal land tax assessed on the unimproved value of the land included in the lease as would have been payable by the appellants had they been owners of the land, and of no other land; he further claimed payment of 550*l.* paid by him in the years 1911 to 1916 on account of the tax in respect of the premises. The appellants pleaded that the statement of claim was bad in law on the ground that by the covenant set out in the statement of claim they were exempt from the payment of land tax, whether Federal or State.

The terms of the covenant and the relevant statutory enactments appear from the judgment of their Lordships.

The point of law raised by the defence was ordered to be heard by the full Court.

Judgment was delivered declaring that the appellants were not exempted by the covenant from payment of the Federal land tax, and by a subsequent order leave was given to appeal to His Majesty in Council.

1918. Dec. 5. *Upjohn K.C.* and *Foa* for the appellants. The appellants are not liable to pay the Federal land tax. The covenant should be read as a whole, the words of exception as to land tax being given a meaning co-extensive with those of obligation. Having regard to the long term for which the premises were demised, the words of exception should not be construed as applying only to existing land tax. Since the obligation to pay the State land tax was not specifically mentioned, the appellants by s. 76 of the (State) Taxation Act, 1884, were under no obligation to pay it. If therefore the exception does not apply to the Federal tax it is nugatory. Sect. 30 of the (Federal) Land Tax Assessment Act, 1910, applies only to cases in which the lessee has assumed

the obligation to pay all taxes on the land, which was not the case here, having regard to the exception.

H. Terrell K.C. and *Fortune* for the respondent were not called on

1919. Jan. 21. The judgment of their Lordships was delivered by

LORD PARMOOR. The appellants, a limited company, incorporated according to the law of South Australia, are lessees of certain land with buildings thereon known as the Red Lion Hotel, City of Adelaide. The lease, which is dated April 11, 1895, is for a term of thirty years from August 1, 1897, at a clear weekly rental of 26*l.* without any deduction or abatement whatever and subject to the covenants, stipulations, and provisos therein contained. Under the terms of the lease the lessee has an option of taking a renewed lease of the premises for the further period of twenty years.

The lease contains the covenant that the lessee "shall and will pay all rates, taxes, charges, assessments, impositions, and other outgoings whatsoever which at the commencement of the term hereby granted, or at any time thereafter during the said term, shall or may be rated, taxed, charged, assessed or imposed on the premises hereby demised or any part thereof, or on the rent thereof or any part thereof, or on the lessor or the lessee in respect thereof except the land tax; and it is hereby declared and agreed that notwithstanding any law to the contrary all or any of such rates, taxes, charges, assessments, impositions and other outgoings (except the land tax) which the lessee shall neglect or refuse or fail to pay may be recovered by the lessor from the lessee as money paid by the lessor for the use of the lessee at the lessee's request or by distress on the premises as for rent in arrear."

At the date of the making of the lease, and also at the date when the term thereby created commenced, there was a State land tax, limited to lands in South Australia, payable in respect of the demised premises. The respondent makes

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no claim against the appellants in respect of this land tax, and does not question his liability to pay the amount charged on the demised premises in respect thereof.

In the year 1901 the Commonwealth of Australia was constituted. In the year 1910 a Federal land tax was imposed on land throughout Australia for the benefit of the Commonwealth Government. The question raised on the appeal is whether the appellants are liable to repay the Federal land tax paid by the respondent in respect of the demised premises. The respondent claimed a declaration that according to the true construction of the said memorandum of lease the appellants are liable to pay so much for the Federal land tax assessed on the unimproved value of the land included in the said memorandum of lease by virtue of the Land Tax Assessment Act of 1910 and the Act amending the same as would have been payable by the appellants if the appellants had been owners of the said land and of no other land. The appellants in their defence objected that the statement of claim was bad in law and disclosed no cause of action, on the ground that they are in law by the covenants set forth in the statement of claim exempted from payment of land tax, whether Federal or State. It was ordered that the point of law so raised should be set down for hearing before the full Court and disposed of before the trial of the action. After argument the Court declared that the appellants are not in law exempted by the covenant set forth in the statement of claim from the payment of Federal land tax. Leave was granted to the appellants to appeal from the said judgment to His Majesty in Council.

It is unnecessary to restate at length the covenant in the lease of April 11, 1895. Subject to the terms of the exception, and to the effect of the State Taxation Acts, 1884 and 1894, and of the Commonwealth Land Tax Act, 1910, and the Commonwealth Land Tax Assessment Act, 1910–1914, it is sufficiently wide to impose on the lessee the liability to pay all taxes which at the commencement of the lease, or at any time thereafter, should be charged on the demised premises or on the lessee in respect thereof. It would therefore

impose on the appellants the payment both of the State land tax and of the Federal land tax, so far as these taxes or either of them are not within the exception, subject to the operation of the State Taxation Acts and the Commonwealth Acts of 1910 and 1910–1914.

The State Taxation Act of 1884 imposes under Part I. a tax called "the land tax" on all lands in South Australia with certain specified exceptions, which do not affect the demised lands. Parts IV. and V. of the Act impose the burden of the tax on the taxpayer, who in the present case would be the respondent. Sect. 76 enacts that no future contract or covenant shall bind any party to relieve any other party of the burden or incidence of any tax for which such last-mentioned party is made liable under the Act, unless the tax in question is expressly mentioned in such contract or covenant. The State land tax imposed in South Australia, under the State Taxation Act of 1884, is not expressly mentioned in the covenant in the lease, and therefore the covenant does not operate to transfer the liability to pay such tax from the respondent to the appellants. The later State Taxation Act of 1894 is incorporated with, and, except so far as inconsistent therewith, is to be read with the State Taxation Act of 1884. It provides for increased land taxes, designated respectively as "an additional land tax" and "an absentee land tax," and enacts in s. 7 that all unrepealed provisions of all existing Acts and regulations relating to the taxes imposed by the Taxation Act, 1884, and assessment therefor, shall, so far as practicable, apply to the increased taxes thereby imposed, and the assessments therefor, except where other provisions are thereby made on the subject, and that the additional land tax and the absentee land tax shall be deemed land tax under the Taxation Act, 1884. At this date s. 76 of the Taxation Act, 1884, was not repealed, and there is nothing inconsistent in its operation on the taxes imposed under the Act of 1894. It therefore follows that no liability for a land tax imposed under the Taxation Amendment Act of 1894 would be transferred from the respondent to the appellants under the covenant in the lease of April 11, 1895, and that

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in respect of any such tax the respondent is not relieved from the liability which the Act imposes on him.

It will be convenient to consider in the next place the effect of the exception "except the land tax." It was argued on behalf of the appellants that these words would include any Federal land tax subsequently imposed, although at the date of the lease the Commonwealth had not been constituted. Their Lordships cannot accept this contention, and are of opinion that it would be extravagant so to construe the language of the exception so as to include a tax which could hardly have been in contemplation of the parties, seeing that the exception itself makes no reference to any tax which may be imposed subsequently to the date thereof. At the time when the covenant was entered into which contains the exception there was in operation a State land tax under the Taxation Act of 1884 which was known to the parties and which in the Act was called "the land tax," and the exception must be construed having regard to the conditions as they existed at the time. Their Lordships are of opinion that the exception cannot be construed to include the Federal tax, and in this respect agree with the decision of the Supreme Court of Australia and with the judgment of the Chief Justice. If owing to the operation of the State Acts of 1884 and 1894 no obligation is placed upon the appellants to pay any State land tax imposed on the demised premises, it is not necessary to determine the exact limitation of the words in the exception, but in the opinion of their Lordships they would include any State land tax whether imposed under the Act of 1884 or of 1894 or under any future amendment or modification of these Acts within the State of South Australia.

It was argued on behalf of the appellants that to limit the exception to a State land tax, within the State of South Australia, would be to render it otiose and unnecessary, since it would then only purport to apply to the exception of a land tax not included in the obligation of the general covenant. Their Lordships do not attach weight to this argument. It is not improbable that a lessee might desire to have his exemption from land tax expressed on the face

of the document, and such a course is not unusual in covenants of this character.

The only remaining matter for consideration is the effect of the Commonwealth Land Tax Act, 1910, and of the Commonwealth Land Tax Assessment Act, 1910–1914. Under these Acts a Federal Land Tax is imposed, payable by the owner of land upon the taxable value of all the land owned by him and not exempt from taxation under the Act. The demised premises would not be exempt under the Act, and therefore, subject to the terms of the covenant, the liability to pay the Federal tax would be charged on the respondent, the lessor. Sect. 63 of the Act renders absolutely void every contract, agreement, or arrangement made or entered into, whether before or after the commencement of the Act, altering or purporting to alter, directly or indirectly, the incidence of any land tax, except as provided by s. 30 of the Act. The effect of this section would be to render the covenant in the lease absolutely void so far as it purports to transfer the liability to pay the Federal land tax from the appellants to the respondent, except so far as may be provided in s. 30 of the Act. The question therefore arises what is the effect of s. 30 of the Act on the liability of the appellants. The subject-matter of s. 30 is "a covenant or stipulation in a lease or agreement for a lease of land, which has or purports to have the purpose or effect of imposing on the lessee the obligation of paying taxes on the land." There is a different provision whether the lease or agreement has been made before or after the commencement of the Act. In the latter case it is absolutely void, but in the former "it shall not be valid to impose on the lessee the obligation of paying land tax to a greater amount than the amount (if any) which would have been payable by the lessee if he had been the owner of the land included in the lease and of no other land." The respondent in his statement of claim only claimed a declaration that the appellants were liable to pay so much of the Federal land tax imposed under the Land Tax Assessment Act, 1910, and the Acts amending the same as would have been payable by the appellants if the appellants had been the owners of

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the said land and no other land, thus bringing his claim within the limitation to be found in s. 30. The consequence is that the Commonwealth Land Tax Assessment Act, 1910–1914, does not relieve the appellants from the liability which the respondent seeks to enforce against them, and that they are liable in respect thereof under the terms of the covenant in the lease. Their Lordships, therefore, are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Burton, Yeates, & Hart.*
Solicitor for respondent: *Thomas D. Reeve.*

[PRIVY COUNCIL.]

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ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Conditional Contraband—Neutral Port—Identity of Consignor and Consignee—Innocent Destination—Onus of Proof—Disclosure of Business—Declaration of London Order in Council, No. 2, October 29, 1914, cl. 1 (iii.) (iv.).

By an Order in Council of October 29, 1914, cl. 1: "(iii.) . . . . conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to or occupied by the enemy. (iv.) In the cases covered by the preceding paragraph (iii.) it shall lie upon the owners of the goods to prove that their destination was innocent."

The ship's papers do not show who is the consignee within the meaning of para. (iii.) unless a consignee distinct from the consignor is named and the onus under para. (iv.) is not discharged if the claimant has not fully disclosed at the outset of his claim all the conditions under which he was carrying on his business in the goods consigned.

APPEAL from a decree of the President of the Admiralty Division (in Prize). (1)

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, LORD STERNDALE, and Sir ARTHUR CHANNELL.

(1) Unreported.

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The Vendsyssil Packing Company, a Danish company carrying on business at Copenhagen and having branches in the United States and in Germany, appealed from a decree condemning 52 tierces of pickled salmon (conditional contraband), shipped from New York to Copenhagen in the Danish steamship *Hellig Olav*. According to the bill of lading the goods were shipped by the appellants and were to be delivered "unto Vendsyssil Packing Co., Copenhagen, or to his or their assigns." The facts are fully stated in the judgment of their Lordships.

The President (Sir Samuel Evans) by his judgment delivered on September 23, 1916, found that the destination of the goods was the appellants' business at Berlin, or that near Lübeck, which places he held to be bases of supply to the enemy. He held that the case was within cl. 1 (iii.) of the Order in Council of October 29, 1914, since even if the goods were not consigned "to order," they were for named consignees in territory belonging to the enemy.

1918. Oct. 16, 17. *Balloch* and *Le Quesne* for the appellants. None of the modifications of art. 35 of the Declaration of London contained in cl. 1 (iii.) of the Order in Council apply. The goods were consigned specifically to the appellants' business at Copenhagen, and not to a named consignee in enemy territory. For purposes of the Order it is not material that the appellants had branches in Germany. The words "to order" are in inverted commas, the intention being to exclude from protection goods which in terms are consigned "to order." The appellants were not merely agents for the enemy as in *The Louisiana*. (1) They are entitled to the benefit of art. 35, and as appears from that case it is not material, even if it were proved, that they intended to supply the enemy. (2) According to international law the onus of proving that the goods were intended for the supply of the enemy's forces was upon the Crown: Pratt's Story on Prize Courts, pp. 45, 46; under the rule in *The Zamora* (3) the Order in Council could not throw the onus upon the neutral shipper.

(1) [1918] A. C. 461. (2) [1918] A. C. 461, 471.
(3) [1916] 2 A. C. 77.

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R. A. Wright K.C. (*Sir Frederick Smith A.-G.* with him) for the Crown. The bill of lading left the goods at the disposal of the appellants; the consignment was therefore "to order." But in any case the ship's papers did not show who was the consignee of the goods; as held in *The Louisiana* (1) they do not do so unless they name a consignee distinct from the consignor. The case therefore falls within cl. 1 (iii.), and by para. (iv.) the onus was on the appellants to prove that the goods had an innocent destination. Upon the facts, that onus was not discharged. The Order in Council taken as a whole is in mitigation of the belligerent rights of the Crown and is valid; para. (iv.) merely affects procedure under the Order: *The Kim.* (2)

Balloch replied.

Dec. 3. The judgment of their Lordships was delivered by

LORD PARMOOR. The appellants are a Danish company carrying on business at Copenhagen in fresh and pickled salmon. They have branches in America, which, in the ordinary course of business, buy the salmon direct from the fisheries. It is only in exceptional cases that they buy from other firms. The salmon is sent to New York and shipped thence to Copenhagen, for sale mainly in Denmark, but also in other countries, including Germany. In Germany the sales were generally, though not entirely, made through branches of the appellants' firm in Berlin and Schlutup, near Lübeck. The branch in Berlin was established in 1907. The last lot of salmon, comprising eight barrels, was sent to Berlin on January 19, 1916. The branch at Schlutup, near Lübeck, was established in 1909. The last lot of salmon, comprising eight barrels, was sent to Schlutup on December 19, 1915. The appellants on December 22, 1915, wired to Hansen, their representative at Seattle, to ship a carload of Columbia River salmon, and, on January 8, 1916, sent a further message, to ask whether the salmon had been shipped. On January 21, 1916, they sent a wireless message in the name of Rollo Export Company to Tyee Fisheries, asking whether the Columbia River and Alaska

(1) [1918] A. C. 461. (2) [1915] P. 215 279, 280.

salmon had been shipped, and received a reply that it had been shipped by steamer on February 3. It is clear, therefore, that, when the first message was sent in reference to the shipment of the salmon in question, the last lot of salmon had only two days previously been sent to Schlutup, and that the last lot of salmon was not sent to Berlin until nearly a month later.

A consignment of 52 tierces of pickled salmon for refrigerator was shipped on the steamship *Hellig Olav*, to be carried under the terms of a bill of lading dated February 4, 1916. The appellants were the shippers and consignors, and the goods were to be delivered at Copenhagen to the appellants or their assigns. Under the terms, therefore, of the bill of lading there was no consignee as distinct from the consignor, the control of the goods remained at the disposal of the shipper and consignor, and there was no independent outside interest in any other party. In effect the bill of lading left the disposal of the goods at the order of the consignors, and the ultimate destination in their discretion. At the time of shipment the tierces of salmon had not been declared as goods for neutral consumption, and no guarantee had been obtained from the Danish Merchant Guild.

The steamship *Hellig Olav* called at Kirkwall on or about February 15, 1916, when the tierces of salmon were ordered to be detained, but allowed to proceed upon an undertaking given to H.M. Government to store the goods in Copenhagen until the close of the present war, or to return them to England for the purpose of prize proceedings. It was not until they had become aware that the seizure had been made that the appellants obtained a guarantee in the usual form from the Merchants' Guild of Copenhagen. A correspondence followed between the appellants and the British Legation at Copenhagen and the British Foreign Office, and finally, on November 25, 1916, the sum of 2019*l.*, representing the insured value of the tierces of salmon, was paid into the Prize Court, for the purpose of obtaining a judicial decision on the legality of the seizure. Evidence was filed on behalf of the claimants, but the respondent, the Procurator-General, filed no evidence, relying on

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the admissions contained in, and deductions to be drawn from, the appellants' affidavit and documents and the correspondence between the appellants and the Procurator-General, the British Legation at Copenhagen, and the British Foreign Office. The case was heard by the learned President, who, on February 23, 1917, pronounced the tierces of salmon to be contraband of war liable to confiscation, and he condemned the same for the sum of 2019*l.* then in court. It was argued on behalf of the appellants that it was not competent for the Prize Court to condemn the goods for the sum of 2019*l.* in place of the condemnation of the goods themselves. Their Lordships are of opinion that, having regard to the terms of the agreement made on November 25, 1916—namely, that the sum of 2019*l.* should be disposed of in accordance with the order of the Prize Court—this objection cannot be maintained.

The main argument urged on behalf of the appellants was that the doctrine of continuous voyage did not apply, and that the shipment of salmon was not within the terms of the modification contained in cl. 1 (iii.) of the Declaration of London Order in Council No. 2, 1914. This modification provides that: "Notwithstanding the provisions of art. 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to or occupied by the enemy." The construction of this modification was considered in the case of *The Louisiana* (1), and the judgment of their Lordships covers the present case. The question arose, in that case, whether the ship's papers show who is the consignee of the goods if the shipper retains control, and can alter the destination of the goods according to his interest, and at his own discretion. It was pointed out that under these conditions the shipper would retain as full control of the goods as if the consignment had been to order, and that conditional contraband could be supplied to the enemy Government, through neutral ports, as freely as if art. 35 of the Declaration of London had

(1) [1918] A. C. 461, 471.

been adopted without modification. The judgment proceeds: "In their Lordships' opinion the words 'the consignee of the goods' must mean some person other than the consignor to whom the consignor parts with the real control of the goods." In the present case there is no person other than the consignor to whom the consignor parts with the real control of the goods, and it follows that the tierces of salmon are liable to capture as conditional contraband, although on board a vessel bound for a neutral port.

It is not necessary to consider the further provisions of para. (iii.), but their Lordships do not desire to throw any doubt on the finding of the President that the ship's papers did show a consignee of the goods in territory belonging to or occupied by the enemy.

The next modification, para. (iv.), provides: "In the cases covered by the preceding para. (iii.), it shall lie upon the owners of the goods to prove that their destination was innocent." The effect of this provision is that in cases covered by para. (iii.) the neutral trader has brought himself under suspicion, and that it is incumbent upon him to displace such suspicion by sufficient proof of the innocency of the destination of the goods which have been seized. The question therefore arises whether the appellants have discharged the obligation which this provision throws upon them.

At the date of shipment, the tierces of salmon had not been declared as goods for neutral consumption, and no guarantee had been obtained from the Danish Merchant Guild. This omission is in itself a ground for grave suspicion. Their Lordships are not satisfied that any sufficient explanation has been given consistent with the innocency of the destination of the tierces of salmon. There appears to be no valid reason why this declaration should not have been made and the guarantee given in the usual course of business. On the other hand, the appellants had undoubtedly an inducement to endeavour to import salmon which could be sent forward to Berlin or Schlutup without the risk that they would be placed on the black list. When the first message was sent to Hansen

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at Seattle to ship a carload of Columbia River salmon, the last lot of salmon had not been sent to Berlin, and the last lot had only been sent, a few days earlier, to Schlutup. There is no direct evidence when the branches at Berlin and Schlutup were actually closed, and the inference is that they had not been closed at the date of the shipment in the *Hellig Olav*. At one time the appellants were placed on the black list, but subsequently removed on the explanation that the salmon sent to Germany had not been imported subject to declaration or guarantee. Their Lordships fully accept the accuracy of the explanation given by the appellants, but it shows the existence of a business under which salmon was imported for enemy destination when not subject to the restrictions which a declaration and guarantee would impose.

Under these circumstances, it was clearly the duty of the appellants to make a full and free disclosure of all the conditions under which they were carrying on their business as importers of salmon. As a matter of fact, the only reference to Germany in the first statement made by the appellants is that, for a short time after the war, some imported goods had been sent to that destination, whereas it appears on further inquiry and in the second report of the accountants on July 3, 1916, that eight barrels of salmon had been sent to Schlutup on December 19, 1915, and eight barrels to Berlin so late as January 19, 1916. Their Lordships are unable to come to the conclusion that the appellants did at the outset make a full disclosure of all the relevant factors attaching to their business, and it has been pointed out in previous cases that it is incumbent upon neutral traders to make such a disclosure in cases where the liability is upon them to remove elements of suspicion which affect the destination of the seized cargo.

Their Lordships therefore find that in the present case the appellants have not discharged their obligation of proving that the destination of the salmon was innocent. During the hearing of the appeal a petition was presented to their Lordships on behalf of the appellants to admit fresh evidence not before the President at the hearing, but their Lordships were

unable to entertain this petition for reasons stated during the hearing of the appeal. The appeal must be dismissed with costs, including the costs of the petition to admit fresh evidence. Their Lordships will humbly advise His Majesty accordingly.

J. C. 1918 THE HELLIG OLAV.

Solicitors for appellants: *Botterell & Roche.*
Solicitor for respondent: *Treasury Solicitor.*

[PRIVY COUNCIL.]

WATCHAM . . . . . APPELLANT;

AND

ATTORNEY-GENERAL OF THE EAST AFRICA PROTECTORATE . . . . . RESPONDENT.

J. C.* 1918 *June* 11.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Evidence — Instrument — Patent Ambiguity — Evidence of User — Falsa demonstratio.

The principle that when an instrument contains an ambiguity evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it is latent.

Where, therefore, in a land certificate issued by the Crown in 1899 there is a variance between the stated acreage and the area as described by physical boundaries (namely, one mile along a river to a width of a quarter of a mile therefrom), evidence can be given of user inconsistent with the area intended being that included in the boundaries, so as to establish that that description is a falsa demonstratio.

APPEAL from a judgment of the Court of Appeal for Eastern Africa (February 25, 1915) affirming a judgment of the High Court of Eastern Africa.

The respondent on behalf of the Government of the East Africa Protectorate sued the appellant to receive 753½ acres of land adjoining the Nairobi River, and for consequential

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD SCOTT DICKSON, and SIR ARTHUR CHANNELL.

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relief. The appellant claimed part of the land under a certificate, dated December 1, 1899, issued to him by the Crown under the East African Land Regulations, 1897. The area included in the boundaries stated in the certificate was necessarily about 160 acres, whereas the certificate stated that the land contained 66 acres 3 roods and 27 perches. No plan was attached to the certificate.

The material terms of the certificate and the circumstances of the case appear from the judgment of their Lordships.

The action was tried by Hamilton C.J., who held that upon the construction of the certificate the appellant was entitled to 66 acres 3 roods and 27 perches. He held that the other defences failed, and ordered possession except as to an area, to be agreed upon survey, sufficient to make up with 39.7 acres appearing upon the plan edged yellow, a total of 66 acres 3 roods and 27 perches.

The Court of Appeal (Bonham-Carter and Tomlinson J.; Ehrhardt J. dissenting) affirmed the decision.

1918. May 7, 9, 10. *Hughes K.C.* and *Sheldon* for the appellant.

Tomlin K.C. and *Vernon* for the respondent.

June 11. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a decree dated February 25, 1915, of the Court of Appeal for Eastern Africa whereby that Court affirmed a decree of the High Court of Eastern Africa, dated May 8, 1913, and made in an action in which the respondent, as plaintiff on behalf of the Government, sued the appellant as defendant in ejectment to recover possession of 753½ acres of land in the Nairobi district and for subsidiary relief.

The defendant claims to be entitled to these lands under three different titles.

First, the Riverside estate, under a certificate from the Crown dated December 1, 1899, made or granted in accordance with the East African Land Regulations dated December 29, 1897, and described as follows, the words in italics being in

print and the rest typewritten : " *The piece of land delineated on the plan hereto attached, situate in the railway mile zone, and containing* 66¾ *acres, or thereabouts, being* in extent from the intake of the Nairobi water supply down the pipe-line for a distance of one mile on the right bank of the river for a width of one-quarter of a mile from the river, and contains an area of 66 acres 3 roods 22 perches, as per plan attached."

The second, styled Moya's land, under a permit dated March 31, 1904, issued to him by the Survey and Land Commissioner, claimed to comprise 350 acres, and the third, styled Masondo's land, alleged to have been acquired by him from Masondo, a native, and claimed to be about 350 acres in extent.

The case was tried before Hamilton C.J., who held that all the land acquired by the defendant through Moya, coloured green on a plan given in evidence at the trial, and numbered plan 1, was outside the land, the possession of which was claimed by the Government. He further held that the land acquired by the defendant through Masondo, styled in the case Masondo's land, and edged brown on said plan 1, formed no part of the area claimed by the Government, and by his decree dated May 8, 1913, ordered that the areas of the lands in respect of which the defendant paid compensation to these two natives, Moya and Masondo, and of which the plaintiff had undertaken to grant leases to the defendant were such as were shown on plan in the action, i.e., plan 1, marked respectively Moya and Masondo.

Their Lordships, after careful consideration of the evidence given in the case and the judgments of the learned Chief Justice and of the learned judges in the Court of Appeal, see no reason to differ from the conclusion which has been arrived at in respect of these two pieces of land. They think the decree pronounced as to them should be confirmed. It only remains to consider the decision arrived at in reference to the Riverside estate.

That estate was in the year 1907 surveyed by a Mr. Woodruffe, the boundaries being pointed out by the Misses Watcham, the sisters of the defendant. It is delineated on the same

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plan and edged yellow, and as surveyed is found to contain only 39.7 acres. Their Lordships are not satisfied that these ladies were authorized by the defendant to point out the boundaries of the estates, as they apparently did, at least to some extent, and do not think that the defendant can be held bound by anything they may have said or done in reference to that subject. The Attorney-General raised no objection at the trial to the boundary of the Riverside estate being extended so as to include a total area of 66 acres or thereabouts, and the Chief Justice held that under the certificate of December 1, 1899, the defendant was entitled to occupy the land edged yellow on the plan, and a further area of 27.21 acres, and ordered that the plaintiff should survey out an additional area to the plot marked Riverside on the plan in the action, so as to make up the holding of the defendant to 66 acres 3 roods 27 poles or thereabouts, the area mentioned in the certificate. He further ordered: "That the defendant do deliver up to the plaintiff possession of all that area within the line marked in red on the said plan, save and except a sufficient area as may be agreed on the survey above mentioned and adjoining Riverside on the south, as shown on the said plan, to make up that holding to 66 acres 3 roods 27 poles or thereabouts."

By the third of the above-mentioned Land Regulations it is provided that every certificate shall be accompanied by plan of the lands, prepared or approved of and signed by a Government surveyor or other officer for the purpose of the Commission; but though words "as per plan attached" appear in the certificate immediately after the description of the parcels, no plan of the kind prescribed was attached to the certificate or produced. An effort was made to show from the conduct and admission of the defendant that a plan found in the Registry, marked 3 and not signed by anyone, had been attached to the certificate and was the plan referred to in the certificate, but in their Lordships' view the effort was not successful. The question, therefore, which their Lordships have to determine, unaided by any map, in effect resolves itself into whether the extent of the property conveyed or assured by the certificate is to be fixed by the description of its

boundaries or by the description of its area. It is not a very easy question.

When there is in an ancient deed or other document a latent ambiguity, extrinsic evidence of user under it may be received to ascertain its meaning. Lord Sugden, in the oft-quoted passage in *Attorney-General* v. *Drummond* (1), said: "One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means."

The reason for that rule is said to be that in the lapse of time and change of manners the words used in the instrument may have acquired a meaning different from that which they bore when originally employed: *Drummond* v. *Attorney-General*. (2) In *Waterpark* v. *Fennell* (3) Lord Cranworth states the rule of law thus: "It is certain that where parcels are described in old documents in words of a general nature, or of doubtful import, we may, indeed we must, recur to usage to show what they comprehend. Where, indeed, words have a clear definite meaning, no evidence can be admitted to explain or control them. Thus, a demise of my messuage at Dale could not by any parol evidence be shown to have been meant to describe not a messuage, but a sheet of water. The distinction is obvious."

But where contemporary exposition is thus relied upon on the ground that the meaning of the words of an ancient grant has changed, the instrument must be old enough to permit this change, and there must be uncertainty or ambiguity in its language: *Rex* v. *Varlo* (4); *Chad* v. *Tilsed* (5); *Lord Hastings* v. *North-Eastern Ry. Co.* (6)

A patent and a latent ambiguity are defined in Lord Bacon's Law Tracts, reg. 23, p. 99, as follows: "There be two sorts of ambiguities of words, the one is ambiguitas patens and the other latens. Patens is that which appeareth to be ambiguous

(1) (1842) 1 Dr. & War. 353, 368.
(2) (1849) 2 H. L. C. 837, 862.
(3) (1859) 7 H. L. C. 650, 680.
(4) (1775) 1 Cowp. 248, 250.
(5) (1821) 2 Brod. & B. 403, 406.
(6) [1899] 1 Ch. 656, 661, 663; [1900] A. C. 260.

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upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed, that breedeth the ambiguity."

The principle of the above-mentioned decisions, so far as it is based on the probability of a change during the lapse of time in the meaning of the language used in an ancient document, cannot of course have any application to the construction of modern instruments, but even in these cases extrinsic evidence may be given to identify the subject-matter to which they refer, and where their language is ambiguous the circumstances surrounding their execution may be similarly proved to show the sense in which the parties used the language they have employed, and what was their intention as revealed by their language used in that sense.

The question, however, remains whether in such instruments as these proof of user, or what the parties to them did under them and in pursuance of them, can be used for the like purpose. In *Wadley* v. *Bayliss* (1) it was decided that the user of a road described in an ambiguous way in an award made under an Enclosure Act by the owner of a holding by the award allotted to him, might be proved in evidence in order to ascertain the meaning of those who worded the award. In *Doe* v. *Ries* (2) Tindal C.J., in delivering judgment, the document to be construed being modern, said: "We are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties." The fact mainly relied upon in that case to show that the document to be construed was a legal demise, and not a mere agreement for a lease, was this: that the person who claimed to be the tenant or lessee had been put into possession and remained there. In *Chapman* v. *Bluck* (3), was practically to the same effect. Tindal C.J., in giving judgment, said: "Looking only at the two first letters between the parties, on which

(1) (1814) 5 Taunt. 752.
(2) (1832) 8 Bing. 178, 181.
(3) (1838) 4 Bing. N. C. 187, 193, 195.

the tenancy depends, I think this falls within the class of cases in which it has been held that an instrument may operate as a demise, notwithstanding a stipulation for the future execution of a lease. But we may look at the acts of the parties also; for there is no better way of seeing what they intended than seeing what they did, under the instrument in dispute." Park J. said: "The intention of the parties must be collected from the language of the instrument and may be elucidated by the conduct they have pursued."

In the case of *Van Diemen's Land Co.* v. *Table Cape Marine Board* (1) the action out of which the appeal arose was brought for trespass on the foreshore of Emu Bay, in Bass's Straits. The plaintiff claimed to be entitled under a grant from the Crown, dated July 17, 1848, in which there was a latent ambiguity. One of the questions in issue was the construction of this grant, and the substantial point in controversy was whether the piece of land granted extended to low-water mark, thus including the foreshore, or only to high-water mark. The plaintiffs sought to prove their title to the locus in quo, including the foreshore, by proof of acts of ownership over it before the grant—namely, that they had been in possession of it and had spent money in improving it, and had continued in possession of it after the making of the grant. The judge at the trial rejected this evidence, and a new trial was moved for because of this rejection. The deed of July 17, 1848, contained a recital that the company had been authorized to take possession of certain lands, and had ever since been in possession thereof. It was held that the evidence abovementioned was improperly rejected. Lord Halsbury, in delivering judgment, after referring to this recital, said: "When these are the circumstances under which the grant is actually made—why is it not evidence, and cogent evidence, when the taking possession of the particular piece of land is proved, and the continuance in possession before and after the grant is proved? .... It would be a singular application of the maxim quoted by Coke (2 Inst. 11), 'Contemporanea expositio est fortissima in lege,' to suggest that the proof of

(1) [1906] A. C. 92, 98.

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user must be confined to ancient documents, whatever the word 'ancient' may be supposed to involve. The reason why the word is relied on is because the user is supposed to have continued, and thus to have brought us back to the contemporaneous exposition of the deed. The contemporaneous exposition is not confined to user under the deed. All circumstances which can tend to show the intention of the parties whether before or after the execution of the deed itself may be relevant, and in this case their Lordships think are very relevant to the questions in debate."

The case of *North-Eastern Ry. Co.* v. *Lord Hastings* (1), above referred to, is not inconsistent with this case, as in it the decision was rested solely on the fact that the language of the instrument to be construed was plain and unambiguous.

These cases, their Lordships think, establish the principle that even in the case of a modern instrument in which there is a latent ambiguity, evidence may be given of user under it to show the sense in which the parties to it used the language they have employed, and their intention in executing the instrument as revealed by their language interpreted in this sense. The question remains, however, whether such evidence can be adduced for the same, or a similar purpose, where the ambiguity in the language of the instrument is patent not latent, as when for instance the description by the boundaries of the property granted conflicts with its description by its acreage, especially where those boundaries are fixed by or measured from natural physical features of the locality. Parcel or no parcel is, no doubt, a matter of fact to be decided by the judge or judges of fact. Extrinsic evidence may be given, as in *Doe* v. *Webster* (2), where a garden proved to have been occupied with a house was held to have passed with the house under the word appurtenances. Direct evidence of the intention of the parties to it is of course inadmissible. Where in a grant of land there is a discrepancy between the parcels as described, and any plan referred to then as far as that discrepancy extends, the description of the parcels will generally

(1) [1900] A. C. 260.

(2) (1840) 12 Ad. & E. 442.

prevail: *Horne* v. *Struben*. (1) Where a deed contains an adequate and sufficient definition of the property which it was intended to pass, any erroneous statements contained in it as to the dimensions or quantity of the property, or any inaccuracy in a plan by which it purports to be described will not vitiate this description: *Mellor* v. *Walmesley*. (2)

Where in a grant the description of the parcels is made up of more than one part, and one part is true and the other false, then if the part which is true describes the subject with sufficient accuracy, the untrue part will be rejected as a falsa demonstratio, and will not vitiate the grant. It may, however, operate as a restriction: *Morrell* v. *Fisher*. (3) It is immaterial, moreover, in what part of the description the falsa demonstratio occurs: *Cowen* v. *Truefitt*. (4) In *Eastwood* v. *Ashton* (5) four heads of identification of the parcels were mentioned in the instrument to be construed. The fourth was a plan endorsed on the deed and coloured pink. The first three of these were uncertain and insufficient, and the plan was accordingly preferred and adopted. In the case of *Herrick* v. *Sixby* (6), a piece of land, about 140 or 150 acres in extent, was divided into two lots and sold. The eastern portion became vested in the appellant. It was described in the deed of conveyance as containing about 90 acres, more or less; the western portion, vested in the defendant, was described as containing about 50 acres. The descriptions in the deeds do not agree as to the way in which the boundary line between them should run. It was found that on the language of the deed it was very doubtful where it was intended the boundaries should run, the description of them equally admitting of two different constructions, the one making the quantity conveyed agree with the quantity mentioned in the deed, and the other making that quantity different; the former was held to prevail. At the trial the respondent went into considerable evidence to prove his continuous possession and enjoyment of the land claimed in accordance with the construction of the deed which

(1) [1902] A. C. 454.
(2) [1905] 2 Ch. 164.
(3) (1849) 4 Ex. 591, 604.
(4) [1899] 2 Ch. 309.
(5) [1915] A. C. 900.
(6) (1867) L. R. 1 P. C. 436.

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he relied upon. This evidence was not dealt with by Sir Richard Kindersley, who delivered the judgment, as inadmissible, though he found it to be unsatisfactory. Sir William Erle, Sir James Colvile, and Sir Edward Vaughan Williams formed with him the Board. And it is scarcely possible that if they considered this evidence of possession and acts of ownership to be inadmissible, that fact would not have been mentioned.

In *Booth* v. *Ratté* (1) the Crown, under the great seal of the Province, granted to one Joseph Aumond a piece of land in the town of Bytown, styled a water lot, bounded as therein described. One of these boundaries was described as " from a point on the River Ottawa, two chains distant from the shore, southerly parallel to the general course of the shore to a point on the northern limit of Cathcart Street, produced on a course of south 66.30 west distant 2 chains from the aforesaid shore of the River Ottawa." The grantee sold portions of this lot to different persons, one of whom was Amable Prevost, to whom he by deed dated November 2, 1867, conveyed the lot described in the grant from the Crown, excepting those portions conveyed to the other purchasers. By deed of July 23, 1867, Prevost conveyed to the plaintiff Booth part of the water lot so granted to Aumond, describing the boundary towards the river, as " thence along the northerly line of Cathcart Street in a westerly direction to the water's edge of the River Ottawa, thence along the water's edge down the stream in a northerly direction to the line of Bolton Street." Here the boundary on the river's side is called the water's edge, whilst in the Crown Grant the boundary on the land granted is described as two chains from the shore. The plaintiff before the conveyance to him was executed was put into possession by Prevost. The contention of the defendants in the original action and on the hearing of the appeal was to the effect that the words " along the water's edge " meant the line which separated the land from the water, and that the plaintiff was not entitled to any strip of subaqueous soil. The plaintiff was allowed to prove acts of ownership over this subaqueous

(1) (1890) 15 App. Cas. 188.

strip, by the erection of a large floating wharf and boating-house moored to the bank of the river, the use and occupation of which he had been permitted to enjoy for many years without objection by the Crown or Prevost. It was held that the description in the conveyance was capable of being explained by possession, and that the possession which in that case followed upon the conveyance was sufficient to give the plaintiff as against Prevost a good prima facie title to the whole of the two chains.

In all these cases the ambiguity, such as it was, was patent not latent. They in no way conflict with the decision in *Clifton* v. *Walmesley* (1), to the effect that where a covenant in a lease is clear and unambiguous the parties whatever their intention, in fact, may have been on entering into it are bound by its terms and extraneous evidence cannot be received in explanation of it. To the same effect are the judgments of Lords Blackburn and Watson in the *Trustees of the Clyde Navigation* v. *Laird*. (2) The case of *Cooke* v. *Booth* (3) to the contrary effect has been discredited and cannot now be regarded as well decided : *Baynham* v. *Guy's Hospital*. (4)

Now, applying the principles established by these authorities to the present case how does the matter stand as regards the first issue upon which the case went to trial—namely, what is the area covered by the original certificate of the Riverside estate, granted by Government to the defendant to which he is now entitled ?

It appears from the judge's note that on April 30, 1913, the defendant put in a medical certificate to the effect that he should not strain his voice, and alleged that he was very unwell, but he never then or at any subsequent sitting of the Court was examined to establish into what area of land he went into possession under the certificate of December, 1899, or what acts of ownership he exercised over any, and if so what portion of the land he now claims. It is found by Hamilton C.J. and not disputed, that the area included

(1) (1794) 5 T. R. 564.
(2) (1883) 8 App. Cas. 658, 670, 673.
(3) (1778) 2 Cowp. 819.
(4) (1796) 3 Ves. 294.

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within the boundaries mentioned in the certificate is 160 acres in extent.

It is also found by the Chief Justice that a Mr. Wilson had for several years before 1904 occupied under the Government a plot of land, 18 acres in extent, L.O. No. 991. This plot would, if the boundaries were correct, form portion of the 160 acres. In addition, the defendant when applying for a certificate for Masondo's land furnished a rough sketch, No. 7, which showed that his Riverside estate was bounded on the west by Mr. Wilson's holding. If the defendant was the owner and occupier of the whole 160 acres this sketch amounted to an admission by him against his proprietary interest. It was urged that Wilson might have acquired his portion either by assignment from the defendant, or from the Government with the defendant's consent. There was no proof whatever of any transaction of this kind. On the contrary a certificate was in the year 1902 given to Wilson by the Commissioner to hold this 18 acres of land direct from the Government for ninety years. No evidence was given on the behalf of the defendant to explain how it came about that he was from before 1902 out of possession of portions of the land he now claims as his own, or how it came about that the Crown in 1902 conveyed it to another, without, as far as it appears, his consent or concurrence. If, however, all that was conveyed to the defendant by certificate was 66 acres 3 roods and 27 poles no such difficulty presents itself since Wilson's holding might well lie outside that area.

Again the rough sketch represents the defendant's holding as bounded on the east by Moya's holding abutting upon the River Nairobi, as both the Riverside and Wilson holdings are represented to do. The permit, dated March 31, 1904, given to the defendant to occupy Moya's holding and accepted by him describes that holding as adjoining the Riverside estate. In this respect the rough sketch must be accurate, but if the relative dimensions of the three plots of land be looked at either on the sketch map, or on the so-called trial map, it is perfectly clear that the river frontage of Riverside could not approach

the mile in length which, if the boundaries in the certificate were accurate, it should do.

Again the rough sketch represents Wilson's holding as bounded on the west by the mission holding, also abutting on the same river. If the boundaries were accurate the mission holding would be cut by a line drawn from the intake at right angles to the course of the river, as it is contended it should be, and a large slice of that holding would be included in the 160 acres which the defendant claims. In fact, this mission land appears to have been sold to Father Burke, presumably as trustee for the missions, and conveyed to him by the Crown by an agreement dated July 12, 1904. In this case, as in Wilson's, there is no proof whatever that this was done with the consent or approval of the defendant, or that Father Burke acquired any interest in the land from the defendant.

If the defendant was the grantee of the 160 acres included within the boundaries as he claims to be, this rough sketch would necessarily involve and embody several admissions against his proprietary interest to the effect that persons other than himself were owners of or were in possession of property he claimed as his own. The certificate is his only title. His user of any of the land must therefore be a user under it. It is a user, however, entirely inconsistent with the larger claim, since it only amounts to the possession and enjoyment of a small portion of that area lying along a comparatively short stretch of the river, not a mile of it. No doubt the part within the map edged yellow is less than the acreage stated in the certificate. The extent of the river frontage of it is not so inconsistent with the area as it is with the boundaries. A trifling removal of the southern boundary of the lot further southward would obviously increase the contents by 27 acres and bring the area up to the figure named.

It is, their Lordships think, clear from these facts that the statement of the boundaries contained in the certificate is no true guide to the ascertainment of the property intended to be conveyed. There is only one other guide—the area. The choice lies between them ; one or other must be a falsa demonstratio. The area comes first and is repeated after the

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boundaries. In their Lordships' view the description of the boundaries is the falsa demonstratio, and the other description being complete and sufficient in itself, that of the boundaries should be rejected.

Their Lordships are therefore of opinion that the judgment appealed from was right and should be affirmed, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant : *Thompsons, Quarrell & Jones.*
Solicitors for respondent : *Burchells.*

[PRIVY COUNCIL.]

J. C.* 1919 *March 3.*

THE RIJN.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Conditional Contraband—Neutral Port—Enemy Destination—Named Consignee—Declaration of London Order in Council, No. 2, October 29, 1914, cl. 1 (iii.).

Decree of the Prize Court condemning conditional contraband (foodstuffs) shipped to consignees at a neutral port affirmed on the grounds that the goods were destined for the supply of the enemy, and that the consignee named in the bill of lading was a mere instrument for carrying out that supply.

Judgment of the Prize Court [1917] P. 145 affirmed.

APPEAL from a judgment of the President of the Admiralty Division (in Prize), delivered on June 6, 1917. (1)

The judgment appealed from rejected the claim of the neutral consignees of conditional contraband goods which at the date of seizure were being carried to Amsterdam under bills of lading dated March 23, 1915, and condemned the goods as conditional contraband destined for an enemy base of supplies.

The claimants appealed.

* *Present :* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, LORD STERNDALE, and SIR ARTHUR CHANNELL.

(1) [1917] P. 145.

1919. Jan. 17, 20, 21. *R. A. Wright K.C.* and *Le Quesne* for the appellants.

Sir Gordon Hewart A.-G., Sir Ernest Pollock S.-G., Branson, and *Joy* (for *Harold Murphy,* serving with His Majesty's Forces) for the Crown.

March 3. The judgment of their Lordships was delivered by

LORD PARMOOR, who, after an examination of the evidence, said that, in their Lordships' opinion, the ascertained facts, certain intercepted letters, and the claimant's failure to disclose material documents, fully justified the conclusions of fact arrived at by the Prize Court. (1)

Their Lordships would humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Botterell & Roche.*

Solicitor for Crown: *Treasury Solicitor.*

(1) Their Lordships' judgment did not deal with the meaning and effect of the provision in the Order in Council of October 29, 1914, cl. 1 (iii.), as to the ship's paper showing who is the consignee, the view taken by the President in the present and other cases having been affirmed in *The Louisiana* [1918] A. C. 461 and applied in other appeals.

[HOUSE OF LORDS.]

H. L. (I.)* 1919 *March* 24.

McELLISTRIM . . . . . APPELLANT;

AND

BALLYMACELLIGOTT AGRICULTURAL CO-OPERATIVE AND DAIRY SOCIETY, LIMITED . . . . . RESPONDENTS.

Restraint of Trade—Co-operative Society—Rules—Ultra vires—Restriction limited in Space, unlimited in Time—Arbitration Clause—Dispute between Member and Society—Action impeaching Rules—Competency—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *ss.* 21, 22, 49, *sub-s.* 1.

A co-operative society, registered under the Industrial and Provident Societies Act, 1893, carried on the business of manufacturing for sale cheese and butter from milk supplied by certain of its members. By its amended rules the society bound itself to take all milk produced by members' cows kept on any lands within a defined area, comprising some eighty townships, at the current price fixed by the committee, and rule 6 (2.) provided that no member having milk to sell, the produce of cows kept within the defined area, should, without the previous consent of the committee, sell any such milk to any creamery other than the creamery of the society, or to any company, society or person who sold milk or manufactured butter for sale. Under rule 16 a member whose shares had been transferred or cancelled thereupon ceased to be a member, but a member was not otherwise entitled to withdraw from the society. Rule 21 required the consent of the committee to any transfer of shares, but the committee were not bound to assign any reason for their refusal. The rules contained an arbitration clause providing for the reference of all disputes between the society and its members to the Irish Agricultural Organisation Society, whose award was to be final.

In an action by a member impeaching the validity of the rules:—

Held, that a dispute whether certain rules of the society were ultra vires was not a dispute between a society and its members within s. 49 of the Industrial and Provident Societies Act, 1893, and that the action was competent.

Heard v. *Pickthorne* [1913] 3 K. B. 299 approved.

Held, further, by Lord Birkenhead L.C., Lord Finlay, Lord Atkinson, and Lord Shaw of Dunfermline (Lord Parmoor dissenting), that rule 6 (2.), read in combination with rules 16 and 21, imposed upon members a greater restraint than was reasonably required for the protection of the society, and was illegal as in restraint of trade and ultra vires the society.

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* *Present:* LORD BIRKENHEAD L.C., LORD FINLAY, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

Tipperary Co-operative Creamery Society v. *Hanley* [1912] 2 I. R. 586 approved.

Athlacca Co-operative Creamery v. *Lynch* (1915) 49 I. L. T. 233 and *Coolmoyne and Fethard Co-operative Creamery* v. *Bulfin* [1917] 2 I. R. 107 overruled.

Decision of the Court of Appeal in Ireland [1918] 1 I. R. 313 reversed.

APPEAL from an order of the Court of Appeal in Ireland reversing an order of Barton J. (1)

The respondent society was a co-operative society, and was registered in 1903 under the provisions of the Industrial and Provident Societies Act, 1893. It was affiliated to the Irish Agricultural Organization Society.

The appellant was a farmer residing at Ballydwyer, Ballymacelligott, in the county of Kerry, and was a member of the respondent society, having joined the society in October, 1903.

The appellant brought an action against the respondent society for a declaration that certain new rules of the society registered on February 1, 1916, were not binding on him as being illegal as in unreasonable restraint of trade and ultra vires the society, and for an injunction to restrain the society from acting upon the said rules.

The society was formed for the purpose of developing and improving the industry of dairy farming in Ireland by carrying on the manufacture and sale of butter and cheese and other milk products from milk supplied by such of its members as had milk to sell.

By rule 20 of the original special rules: "Any member, who shall supply milk to any creamery other than that owned by the society, for the space of three years from the date of his admission to membership, without the consent in writing of the committee, shall forfeit his shares, together with all money credited thereon."

In 1915, at the instance of the Irish Agricultural Organization Society, a set of new rules was prepared, and Co-operative Creameries which subscribed to that body were pressed to adopt these rules in lieu of their existing rules.

(1) [1918] 1 I. R. 313.

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By a resolution passed at a special general meeting of the society, held on January 18, 1916, these new rules were adopted, and on February 1, 1916, they were registered by the Registrar of Friendly Societies in Ireland. The appellant and a few other members of the society voted against the adoption of the new rules.

The new rules, so far as material, provided as follows :—

"5. The society shall consist of the special members and of all such persons resident in, or occupying or grazing lands in, the townlands of" [here followed the names of eighty-six townships, including Ballydwyer and Ballymacelligott] "and of such other societies, wherever situated, as the committee of management may admit to membership. . . . .

"No person carrying on any business similar to that in which the society is engaged shall be eligible to become or continue as a member of the society. . . . ."

"6. (1.) The society, so long as it shall have a creamery working, shall, subject to the exceptions hereinafter mentioned in this rule, accept from every member having milk to sell all milk produced by such member's cows kept or grazed on any lands within the area defined in rule 5, provided such milk shall be delivered fresh and in good condition at the creamery of the society at such times as the committee shall appoint, and the society shall pay for such milk at the current price or rate fixed by the committee for milk supplied to the creamery by members of the society. In case of default by the society it shall pay to every such member in respect of whom the society has made default, as and for liquidated damages, and not by way of penalty, the sum of one shilling per cow per day for every cow's milk not so accepted while such default continues. (2.) After the society shall have started a creamery for its members, no individual member of the society, so long as he continues a member thereof, who shall have milk to sell, the produce of a cow or cows kept or grazed on lands within the area defined in rule 5, shall, without the written consent of the committee first obtained, sell any such milk to any creamery other than a creamery of the society, or to any company, society, person

or persons who sells milk, or manufactures butter for sale. Any member of the society committing a breach of this rule shall pay to the society, as and for liquidated damages, and not by way of penalty, the sum of one shilling per cow per day for every cow's milk sold contrary hereto."

[Clause 3 was immaterial to the purposes of the present appeal.]

"Provided always that:—

"(*a*) Instead of proceeding for damages as aforesaid, the committee may refuse to purchase the milk of any member who shall commit a breach of the terms of clause 2 of this rule."

[Proviso (*b*) was immaterial.]

"16. Any member, all of whose shares have been transferred or cancelled, shall thereupon cease to be a member of the society. A member shall not otherwise be entitled to withdraw from the society."

"21. Every share shall be transferable as hereinafter mentioned.

"A member may, with the consent of the committee of management, transfer all or any of his shares to any person upon giving one calendar month's notice in writing to the secretary, stating the full name, place of residence, and occupation of such person, the number of shares intended to be transferred, and the consideration for the transfer.

"The committee shall not be bound to assign any reason for refusing to sanction any transfer of shares.

"No share shall be withdrawable. . . . ."

"69. Any dispute arising between the society and its members, or between the society and other societies affiliated to the I. A. O. S., shall, unless amicably adjusted, be submitted for arbitration to the committee of the Irish Agricultural Organization Society, who may either arbitrate the case themselves or appoint some person or persons to arbitrate it on their behalf. . . . . The award so made on every such arbitration shall be final and binding on all parties."

[By rule 72 the net profits of the society, after payment of interest on loan capital, were to be applied, after allocating a certain proportion to reserve fund, firstly, to the payment

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of interest on fully paid-up shares not exceeding 5 per cent.; and, secondly, to a dividend to persons employed by the society and to members at an equal rate in the *l.*, calculated on the amount of their wages and their trade respectively during the period to which the division related.]

The action was brought by the appellant on behalf of himself and the other dissentient members of the society.

Shortly after the issue of the writ the society moved to have the action stayed, on the ground that the new rules provided that disputes between the society and its members should be decided by arbitration.

Pim J. refused the motion, and his order was affirmed by the Court of Appeal in Ireland. (1)

The appellant by his statement of claim alleged that the effect of the new rules was to make it impossible for members ever to withdraw from the society and to compel them to sell all their produce to the society at a price to be fixed by the society itself; and that such restrictions were ruinous to members and were unnecessary for the protection of the society's interests.

The society by their defence traversed the appellant's allegations, and alleged that the new rules were so framed as to afford the greatest possible advantage and protection to the members and were good and valid in every respect. They further alleged that the jurisdiction of the Court was ousted by the arbitration clause in the new rules.

At the trial evidence was given on behalf of the society for the purpose of showing that the new rules were required for the protection of the society. The effect of the evidence is stated in the judgments of the noble and learned Lords.

Barton J. held that rule 6 (2.) was not binding on the appellant.

The Court of Appeal in Ireland (Sir I. J. O'Brien L.C., Ronan and Molony L.JJ.), following *Coolmoyne and Fethard Co-operative Creamery* v. *Bulfin* (2), held that the new rules were valid and were binding on the present appellant, and dismissed the action.

(1) [1917] 1 I. R. 93. (2) [1917] 2 I. R. 107.

Feb. 12, 13, 14, 17.

Serjeant Sullivan K.C. and *S. L. Brown K.C.* (with them *Arthur Cleary*), all of the Irish Bar, for the appellant.

The question is whether certain new rules of the society are ultra vires. By s. 21 of the Industrial and Provident Societies Act, 1893, the registration of a society shall render it a body corporate with limited liability; by s. 22 the rules of a registered society shall bind the society and all members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules a covenant on the part of such members to conform thereto, subject to the provisions of the Act; and by s. 60 (*d*)—the section which deals with the liability of the members in a winding up—no contribution shall be required from any individual exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a past or present member. The position of a member of a company registered under this Act is analogous to that of a member of a limited company under the Companies Acts. See Companies (Consolidation) Act, 1908, ss. 2, 14, 123. The liability of a member is limited to the amount which he agrees to pay for his share, and he shall not be required to contribute to the capital of the company anything more than that agreed amount. The objects of this society do not enable it to carry on any part of the business which the appellant carries on. Rule 6 (2.) of the new rules constitutes a prohibition against dairy farmer members of the society disposing of their produce to others than the society, and the price to be paid by the society is to be fixed by the committee, the farmers having no control over the price. The result of holding this rule valid is to make the member the slave of the committee. It is in restraint of trade and is ultra vires as trespassing against the rule as to limited liability. This is not like a trade combination case or a trade union case. Nor does the membership of this society give to the member any access to any trade secret. The committee had no interest, the protection of which gave them any right to restrict the member in the way of carrying on his

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own business. No society has by its rules the right to interfere with the private property or the private business of its members. *Tipperary Co-operative Creamery Society* v. *Hanley* (1), where a rule similar to rule 6 (2.), except that it contained no limitation as to space, was held to be illegal as being in restraint of trade, is important as showing that these rules operate as a contract and are open to the same infirmities. The contract between a member and the company is not truly analogous to a contract between partners. Membership of this company does not affect the member's title to his farm or his cattle; the contract is in respect of his rights in his capacity of member only. As far as the appellant is a producer of milk he is an absolute stranger to the society. The argument founded on partnership is fallacious because the society does not sell or produce milk. There is no part of the appellant's farming business with which the society has any concern; the common enterprise is the manufacture of butter. By the new rules a member is not at liberty to forfeit his shares and go out. Here, as in *Hanley's Case* (1), there is an absolute prohibition against withdrawal, a fact which was much relied on by Holmes L.J. in the former case. It is ultra vires the society to seek by its rules to exercise control over private property of individual members which they own otherwise than as members. The Court of Appeal in this case have considered themselves bound by *Coolmoyne and Fethard Co-operative Creamery* v. *Bulfin* (2), where the rule was identical with the rule in the present case. It is difficult to reconcile that case with *Hanley's Case.* (1) In view of the decision in *Hanley's Case* (1) the rule has been trimmed and a few excrescences have been lopped off, but the vice of the rule remains. In the case of a farmer the space limit is purely illusory, because a man cannot easily leave his farm. In *Athlacca Co-operative Creamery* v. *Lynch* (3) Ronan L.J. was wrong in relying on this distinction as taking the case out of *Hanley's Case.* (1) *Hanley's Case* (1) was rightly decided, and governs this; and *Athlacca Co-operative*

(1) [1912] 2 I. R. 586. (2) [1917] 2 I. R. 107.
(3) 49 I. L. T. 233.

Creamery v. *Lynch* (1) and *Coolmoyne and Fethard Co-operative Creamery* v. *Bulfin* (2) are erroneous. This is an attempt on the part of the society to protect itself against competition per se, which the law will not allow: *Herbert Morris, Ld.* v. *Saxelby*. (3) Property is the keynote of the judgments in this House in that case. If membership of this society gave the appellant opportunities of acquiring any trade secret or confidential information, which is in the nature of property of the society, then a rule of this kind would be most reasonable; but a rule which prevents a member from earning his living by his skill and labour, which are his own property, is not reasonable. [Upon this point they also referred to *Attorney-General of Australia* v. *Adelaide Steamship Co.* (4); *North Western Salt Co.* v. *Electrolytic Alkali Co.* (5); *Joseph Evans & Co.* v. *Heathcote* (6); *Mason v. Provident Clothing and Supply Co.* (7); *Horwood* v. *Millar's Timber and Trading Co.* (8)] The rule states that a certain sum per cow is to be payable for the breach of the rule as liquidated damages, but this must obviously be treated as a penalty. [This was conceded by the respondents' counsel.] This particular alteration of the rules was not within the power of this society to alter its rules. All the cases in which an alteration of the rules has been held good are cases in which the alteration affects the internal administration of the company's own affairs or the rights of the members as such; but in no case has an alteration been allowed which affects the relation of the member to third parties. This is illustrated by the following cases: *Pepe* v. *City and Suburban Permanent Building Society* (9); *Allen* v. *Gold Reefs of West Africa* (10); *Andrews* v. *Gas Meter Co.* (11); *Strohmenger* v. *Finsbury Permanent Investment Building Society*. (12) Rule 6 (2.), standing by itself, is illegal, because it purports to affect property to which the member derives title otherwise than by reason of his membership;

(1) 49 I. L. T. 233.
(2) [1917] 2 I. R. 107.
(3) [1916] 1 A. C. 688, 700, 714.
(4) [1913] A. C. 781.
(5) [1914] A. C. 461.
(6) [1918] 1 K. B. 418, 425, 429.
(7) [1913] A. C. 724.
(8) [1917] 1 K. B. 305.
(9) [1893] 2 Ch. 311.
(10) [1900] 1 Ch. 656.
(11) [1897] 1 Ch. 361.
(12) [1897] 2 Ch. 469, 479, 480.

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a fortiori it is illegal, when read in combination with rules 16 and 21, which condition release from membership upon the consent of the committee.

Conner K.C. and *Carrigan K.C.* (with them *Denis B. Sullivan*), all of the Irish Bar, for the respondents. The respondents do not contend that the sum mentioned in rule 6 (2.) can operate as liquidated damages, nor do they contend that *Tipperary Co-operative Creamery Society* v. *Hanley* (1) is bad law. The vital point of difference between this case and recent decisions of this House as to restraint of trade is that this is a case of a co-operative society. The test of illegality in such a case is quite different from the test in a case, for instance, of master and servant. This association is analogous to a partnership. Substantially the parties are carrying on business in partnership. By rule 72 all the profits, subject to 5 per cent. interest payable on the fully paid-up shares, are divided among the milk supplying members, and, where all the members are interested in the business of the society going on, there is nothing unreasonable in these rules. It is not in the interest of the society to put any greater restriction upon its members than is reasonably required for the protection of the society, and the rules are framed for the benefit of the members. Rule 6 (2.) is wanted to give stability to the supply of milk. That is essential to the existence of these co-operative societies. It is necessary to protect the society against unscrupulous competition and to prevent members from being enticed away by fancy prices. In the case of a co-operative society there is nothing unreasonable in framing a rule preventing members from dealing with a competitive establishment in preference to their own. The object of the rule is to secure continuity of supply, and to compel members to deal with their own society. This being a co-operative society dealing with the goods of the members for their own profit, the rule is not open to objection. As Ronan L.J. stated in *Coolmoyne and Fethard Co-operative Creamery* v. *Bulfin* (2): "It has been often said that companies are of the nature of partner-

(1) [1912] 2 I. R. 586. (2) [1917] 2 I. R. 107, 131.

ships," and he quoted with approval a passage from a judgment of Buckley J. in *Newton* v. *Birmingham Small Arms Co.* (1), to the effect that the members of a company under the Companies Acts were partners in a special sort of partnership modified and governed by statutory provisions. The analogy applies with peculiar force to a private company, which this society resembles. In the circumstances of this case there is nothing in these rules which is against the public interest simpliciter or is beyond what is reasonably necessary to protect the parties to the contract. The rule in *Hanley's Case* (2) was essentially different. It is true that the rules in this case contain a provision that the transfer of shares is subject to the consent of the committee—and it is necessary for the protection of the society that the committee should have this power—but the appellant has not asked to transfer his shares, and there is no case on record where the committee have refused to consent to a transfer. Further, the jurisdiction of the Court is ousted by the arbitration clause in the rules: *Cox* v. *Hutchinson* (3); *Catt* v. *Wood.* (4) [Upon this point they also referred to and distinguished *Heard* v. *Pickthorne* (5); *Andrews* v. *Mitchell* (6); *Tabernacle Permanent Building Society* v. *Knight.* (7)]

Serjeant Sullivan K.C. in reply. Upon the question of jurisdiction this case is governed by *Heard* v. *Pickthorne* (5), as the Courts below have held.

The House took time for consideration.

March 24. LORD BIRKENHEAD L.C. My Lords, in this appeal the appellant seeks a declaration that a certain rule of the respondent society is not binding on the members as being improperly adopted to his prejudice, illegal because in restraint of trade, and ultra vires the respondent society, and he asks for an injunction to restrain the respondent society from acting thereon.

(1) [1906] 2 Ch. 378, 386.
(2) [1912] 2 I. R. 586.
(3) [1910] 1 Ch. 513.
(4) [1910] A. C. 404.
(5) [1913] 3 K. B. 299.
(6) [1905] A. C. 78.
(7) [1892] A. C. 298.

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At the trial judgment was entered for the plaintiff but this was reversed by the Court of Appeal in Ireland, and from that reversal the present appeal is brought.

The respondent society was registered on March 6, 1903, under the Industrial and Provident Societies Act, 1893, and was governed by special rules applying and modifying general rules.

By rule 3 of the special rules the society was empowered to carry on the occupations (inter alia) of dairymen and manufacturers of dairy produce, but there was no limitation as to the area within which such occupations might be carried on. Rule 4 provided that the shares should be transferable only, except guarantee shares, which if issued were to be withdrawable. Rule 11 specified certain rules which were declared to be fundamental and alterable only at a special general meeting by a two-thirds majority representing at least two-thirds of the nominal capital. Rule 20 provided that any member who should supply milk to any other creamery than that owned by the society for three years from his admission to membership without the consent of the committee should forfeit his shares. The general rules provided for the constitution of the society. Rule 45 enabled a member to transfer his shares with the approval of the committee. Rules 63-68 and rule 72 provided for the holding and conduct of special meetings, and rule 120 provided for the amendment of rules not declared to be fundamental.

Towards the end of 1915 the committee were considering a proposal to establish a new creamery at a place called Gortatlea, and on November 15, 1915, the committee passed a resolution to call a special general meeting on December 7 to consider the adoption of a complete amendment of the society's rules. This meeting proved abortive and another meeting was held on January 18, 1916, at which a resolution to re-adopt the complete amendment of the society's rules was declared to be carried by the requisite majority. These new rules superseded both the special and the general rules and are called in the proceedings the rules of 1916. They

were registered on February 1, 1916; and it is with these rules that your Lordships are concerned.

Rule 5 names some eighty townships, and provides that persons residing within any of them may become members. Other persons may become members if certain conditions are fulfilled, but no person carrying on business similar to that of the society is eligible to become or remain a member.

Rule 6 (1.) binds the society to take all milk produced by members' cows kept or grazed on any lands within the area defined by rule 5, provided such milk shall be delivered fresh and in good condition at the creamery of the society at such times as the committee shall appoint, at the current price or rate fixed by the committee. In default the society is to pay 1*s*. per cow per day for every cow's milk not so accepted.

Rule 6 (2.) binds the member to sell such milk to the society, and if he without the written consent of the committee sells such milk to any creamery other than a creamery of the society or to any milk seller or butter manufacturer he is to pay to the society the sum of 1*s*. per cow per day for every cow's milk sold contrary to the sub-rule.

Rule 6 (3.) sets out exceptions which are not material.

Rule 16 provides that a member whose shares have been transferred or cancelled thereupon ceases to be a member, but a member is not otherwise entitled to withdraw from the society.

Rule 21 requires the consent of the committee to any transfer of shares but the committee are not bound to assign any reason for refusal.

Rule 69 provides that any dispute between the society and its members shall be submitted for arbitration as therein provided.

This rule brings into operation s. 49 (1.) of the Act of 1893.

At the trial oral evidence was adduced to show that the provisions of rule 6 (2.) would prevent any member who kept milch kine from selling to anyone but the society, and that the society's prices were less than those obtained by members who up to then had not sold their milk to the society.

The plaintiff's attack was directed to the combined effect

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of rule 6 (2.), rule 16, and rule 21. I was not impressed by the criticism of 6 (2.) standing alone. But, having regard to the view which I have formed, it is not necessary to examine this contention. No attempt was made to show that the society was acting from improper or indirect motives.

The defendants adduced evidence to show that the amendments were made to carry out an arrangement to establish an auxiliary creamery at Gortatlea. Mr. Byrne, the secretary, said that it was necessary to protect the society against the unscrupulous competition of those who might pay a special price to kill the new branch, and also to enable the society to refuse unclean milk without members being able to take it to proprietary creameries. In cross-examination he said that the society would not take the risk of a new creamery without some guarantee that it would be supplied with milk. He was cross-examined with the object of proving that the society was applying the milk profits to capital expenditure. In re-examination he said that the necessary capital was borrowed from the bank on the guarantee of some of the members, and unless some such rule were adopted the members who had not guaranteed could leave the creamery without milk.

Mr. Jones, the chairman of the respondent society, said that the grounds for the rule were to guarantee an honest price to the creamery, and as the Gortatlea people were coming in the rules were to be adopted in order that they should be loyal to the society.

Mr. Riddall, an inspector of the Irish Agricultural Organization Society, gave evidence that it was essential that a co-operative society should be ensured trade and that its members should be bound to deal with it. He admitted that a member who did not want to make butter and had other outlet for milk but a creamery would have the market closed to him by the rule. He also admitted that the rule might throw the burden on the farmer members who had not guaranteed. It was a form of counter-security. The Rev. Patrick J. Brennan supported the rule on the grounds that some farmers were unreasonable and were open to the temptation of competition prices, and that the rule assured

a larger supply of milk and safeguarded the position of the guarantors. As an application to stay the proceedings had been refused by the Court of Appeal in Ireland, and as a rule in the same terms had been held valid in two cases, namely, *Athlacca Co-operative Creamery* v. *Lynch* (1) and *Coolmoyne Co-operative Creamery* v. *Bulfin* (2), the judge and the Court of Appeal were only at liberty to decide whether the present case was distinguishable from the *Coolmoyne* (2) and *Athlacca* (1) cases. The House of Lords is not so bound, and the questions decided by the Court of Appeal on the application for a stay, and by Ronan L.J. sitting as a Judge of Assize in the *Athlacca Case*, and by the Court of Appeal in the *Coolmoyne Case*, fall to be decided in this appeal.

I deal first for convenience with the short contention that the difference between the parties was a dispute under the provisions of s. 49, sub-s. 1, of the Industrial and Provident Societies Act, 1893, and, therefore, that the present action was not competent.

I am of opinion that this contention is ill founded. The question here is whether certain rules were illegal and ultra vires. Such a dispute is not a dispute between a member and the society within the meaning of the statute. The appellant in this case professes that he has not quarrelled with the society as lawfully constituted, but complains that the constitution of the society has been illegally altered. The dispute, therefore, rightly viewed, is a dispute between the persons as to the true constitution of the society. I adopt upon this part of the case the reasoning and the decision of the Court of Appeal in *Heard* v. *Pickthorne*. (3)

I now approach the larger question whether the combination of rules attacked by the appellant in this case can be supported. I am of opinion that it cannot, and that the decision of the Court of Appeal in Ireland must be reversed.

The matters which were argued before your Lordships were much discussed in the Court of Appeal in Ireland in the case of the *Tipperary Creamery Society* v. *Hanley*. (4) The

(1) 49 I. L. T. 233.
(2) [1917] 2 I. R. 107.
(3) [1913] 3 K. B. 299.
(4) [1912] 2 I. R. 586.

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rules under consideration in that case were not identical with the rules which are before your Lordships. In particular, the restraint in *Hanley* (1) extended over the whole of Ireland, and was not confined, as it is here, to a number of adjacent townships. But it is to be observed that in a sparsely inhabited agricultural neighbourhood, with scanty means of communication, a prohibition of trade in every township within a radius of ten miles, might have precisely the same effect upon the business of a small trader, as if the preclusion extended to the remotest corners of Donegal. Holding as I do that *Hanley's Case* (1) was rightly decided, and that the effects of the present rules cannot on a true view of the law be distinguished from the effects of the earlier rules in *Hanley*, the conclusion follows that Ronan L.J. was bound by *Hanley* when he decided *Athlacca Co-operative Creamery* v. *Lynch* (2), and that he ought to have held himself so bound. Similarly, in my view the decision of the Court of Appeal in Ireland in *Coolmoyne Co-operative Creamery* v. *Bulfin* (3) (on which the Court of Appeal founded itself in the present case) was wrongly decided, inasmuch as it was covered by the decision in *Hanley's Case*. (1)

The principles of law which ought to be applied in such disputes as the present have been so fully and so recently expounded by your Lordships that no useful purpose would be served by attempting to restate them at length. Certain conclusions however which are directly relevant to the present dispute may be summarized.

A contract which is in restraint of trade cannot be enforced unless (*a*) it is reasonable as between the parties; (*b*) it is consistent with the interests of the public.

Your Lordships have recently laid down rules as to where the onus lies in these matters. Such considerations however do not arise in the present case.

Every contract therefore which is impeached as being in restraint of trade must submit itself to the two standards indicated. Both still survive. The observation made by

(1) [1912] 2 I. R. 586. (2) 49 I. L. T. 233.
(3) [1917] 2 I. R. 107.

the Judicial Committee in the *Attorney-General of Australia* v. *Adelaide Steamship Co.* (1): "Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public"; is not, in my view, to be construed as if both the tests indicated were not still in existence. It is indeed not difficult to conceive of a case in which a contract in restraint of trade might be adjusted to safeguard the reasonable interests of the contracting parties, and yet might be opposed to the public interest.

There is much to be said for the view that the restraint objected to in this case would be opposed to the public interest, but I do not think it necessary to decide this, having regard to the clear view which I have formed that the rules under consideration are not reasonable as between the parties.

My Lords, so much guidance has been given by this House in recent decisions to those whose duty it is to understand the criteria by which one tests the meaning of "reasonableness between the parties," that little need be added upon this point. The real test is, as your Lordships have so often pointed out, does the restriction exceed what is reasonably necessary for the protection of the covenantee? To make the matter particular your Lordships have to reach a conclusion as to whether the combined effect of rule 6 (2.), rule 16, and rule 21 is or is not to impose upon the appellant a greater degree of restraint than the reasonable protection of the respondents requires.

It is evident that the first question which requires an answer in this action is: "What was it against which the respondents were reasonably entitled to protect themselves?" Until this question is answered no answer is possible to the principal inquiry whether that which was stipulated for exceeded the reasonable needs of the case. My Lords, before attempting to discover a positive answer to the question I have proposed, it may be possible to clear the ground somewhat by answering it negatively. The respondents were not entitled to be protected against mere competition. No excellence of motive

(1) [1913] A. C. 781, 795.

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on their part, no record of efficient public service, can for this purpose place them in a different position from that occupied by any private contracting party who is called upon to justify his restraint. And it has been laid down by your Lordships over and over again that in this class of case the covenantee is not entitled to be protected against competition per se. The present case is entirely different from those in which he who has bound himself by the restriction has obtained inside knowledge or competitive resource by reason of the fact that special confidence under unusual circumstances has been reposed in him.

But a negative answer is not enough. I addressed a question upon this point to the learned counsel who appeared for the respondents, and I am not indisposed to accept his answer as reasonable. Mr. Conner replied to my question: "The respondents are entitled to such a degree of protection as will ensure stability in the lists of their customers." Let me then, without subscribing entirely to the words of this answer, treat it as being generally acceptable. Were the rules complained of necessary in order to secure stability in the lists of the respondents' customers? By "stability" must, of course, be understood such reasonable stability of relationship as a careful merchant is content with.

In order to answer the question indicated above the scope of the three rules complained of must be examined. I have already set out their terms. The combined effect is this. A member, if he joins young enough and lives long enough, may be precluded under heavy penalty for sixty years or more, and over a considerable area, from selling his milk to any creamery other than the respondents' creamery, or to any person who sells milk or manufactures butter for sale. It is necessary to notice that the penalty provided is avoided in favour of the member who obtains the written consent of the committee before making the sale otherwise prohibited. It is not pretended that it was the policy of the committee to give such consent. I say for sixty years or more, because having regard to the age at which members become eligible for election, and to the possibilities of human life, the

supposition is by no means extravagant. It is possible that rule 6 (2.) could have been supported as part of a code which provided, in further rules, reasonable conditions of withdrawal. But the conditions of withdrawal which are contained in 16 and 21 are such as to make it for ever impossible for a member to withdraw, unless the committee gives its consent. Under rule 16 no member may withdraw unless his shares have been transferred or cancelled. Under rule 21 no share may be transferred unless with the consent of the committee of management. And it is expressly provided that no share shall be withdrawn. The result is that an unwilling member is likely to find himself precluded for life from disposing of the raw materials of his trade to anyone but the respondents (with the exceptions already noted) within a radius which may easily include every neighbouring centre of population which affords him the slightest prospect of a valuable market. It is no answer to such a man to say: "You can go elsewhere." He may easily be owner in fee of a small holding which has been in his family for generations. The fact that his integrity is known amongst his neighbours may be no small element in his stock of trade. Further, the power of migrating to a part of Ireland in which he may never have lived, and where nobody may know him, cannot be considered to be any alleviation of the severity or unreasonableness of the rule.

The position therefore is that the respondents claim to impose a restraint, within the limits already indicated, upon any one of their members which will last for life unless the committee empowers him to transfer his shares. My Lords, I see no reason whatever for supposing that, unless in the most exceptional cases, the committee would give such consent. In fact, they could not so consent without abandoning the whole spirit of their contentions and submissions before your Lordships. Indeed, holding the views they do they would be lacking in their duty to their members if they consented upon a large, or even upon a moderate, scale to such transfers, for they have explained very candidly to your Lordships the reasons which oblige them to insist upon

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continued membership. It is even necessary, so it is explained, to depress the prices paid to their members for milk in order to increase the capital available for new building operations. The result evidently may be that a member in township A receives admittedly less than the local value of his milk in order that township B ten miles away may be indulged with a creamery of its own. It is by no means to be supposed that I am disputing either the wisdom or the commercial justification of such a policy. I am using the illustration in order to make it clear that it is impossible for a society, whose extension requires such methods, to allow a wholesale transference of shares by members who find themselves in the position of the member whom I have imagined to be carrying on his business in what I called township A. I assume therefore—and indeed the contrary was not seriously argued—that transfers would not be granted by the committee.

It is therefore necessary to ask plainly whether it can be reasonably necessary for the protection of the respondents to tie the appellant for life unless the committee thinks fit to grant him a dispensation. I am clearly of opinion that it is not and cannot be so necessary. I am further of opinion that these three rules read together are bad as being in restraint of trade and not reasonable as between the parties. It is not for your Lordships to frame rules which would be good. It is, however, obvious that the objects indicated and claimed by Mr. Conner on behalf of the respondents could be secured in a variety of ways by imposing restraints which would fall short of those attempted to be enforced in the present case.

Lord Finlay. My Lords, the appellant is a shareholder in the respondent society. He brought this action to have it declared that certain rules adopted by the society and registered on the 1st February, 1916, are not binding upon himself and the other members, as improperly adopted to the prejudice of the appellant and illegal as in restraint of trade, and ultra vires of the society.

Barton J., before whom the case was tried, made the declaration prayed for, but the Court of Appeal reversed his

decision. The appellant now asks that the decision of Barton J. should be restored.

The society was registered on March 6, 1903, under the Industrial and Provident Societies Act, 1893. It is a corporation with limited liability (s. 21), and the rules bind the society and its members as if each particularly had covenanted to observe the same (s. 22). Provision was made by rule 120 of the Original General Rules for the amendment of any rule not declared to be fundamental, and for the passing of new rules by a majority of two-thirds of the members present at any special general meeting. New rules were framed and adopted on February 1, 1916, and the object of the present action is to have it declared that the new rule 6 (2.) is illegal as in restraint of trade and ultra vires.

The society exists for the manufacture and sale of butter and cheese made from milk purchased from certain of its members at prices fixed by the committee. Rule 20 of the Original Special Rules was as follows. [His Lordship read the rule.] It was explained that this rule has been construed as applying to the sale of milk to any other creamery at any time within three years of the admission of the member.

In the new rules of February 1, 1916, the above rule is replaced by the following. [His Lordship read rule 6 (2.) and proviso (*a*) at the end of the rule, rule 16 and rule 21.]

The effect of these rules taken together is that until the committee sanctions a transfer of his shares a member remains a member and subject to rule 6 (2.). There is no doubt that rule 6 (2.) is in restraint of trade, as it forbids the member to dispose of the milk produced on his farm as he pleases. But the society contend that it is not bad on that ground inasmuch as it does not exceed what is reasonably wanted for the protection of the business of the society.

A certain amount of stability in the milk supply available to such a society is essential. They make their profits by the sale of the butter and cheese which they manufacture, and if the supply of the milk which they want for such a purpose is liable to sudden and violent fluctuations it would be difficult or impossible to arrange for the carrying on of their business

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successfully. In a co-operative society of this kind the society depends upon getting a supply of milk from its members which will enable the society to conduct profitably their business of making and selling butter and cheese. It was urged upon us that the members may be induced by offers of higher prices to discontinue their supply of milk to the society, and that some security against fluctuations in the supply from such causes is necessary. I agree with this argument, but the question remains whether restraint on the ordinary freedom which every man enjoys of selling his own goods is not carried by this rule to a point beyond what is reasonably required for the protection of the society's business.

If a member could cease to be a member at his pleasure there would be no ground for complaint. No one can say that it would be unreasonable that it should be one of the conditions of membership that while a man chooses to remain a member he should supply his milk to the society and to no other dairy company. It does not appear that any hardship was ever alleged in connection with the old rule No. 20 of the Special Rules, 1903. Under that rule, if at any time within three years of his admission a member supplied milk without the sanction of the committee to any creamery not owned by the society he forfeited his shares. It is said that although the society prospered under that rule there was a necessity for further precautions against the diversion to other dealers of milk produced on the farms of members, and that rule 6 (2.) was framed for that purpose.

There is nothing unreasonable in the provision that the consent of the committee is necessary for a transfer of shares. But this provision, reasonable in itself, has a most important effect upon the scope and operation of rule 6 (2.). A member cannot cease to be a member except by getting rid of his shares, and if the committee refuse to give their consent, the member remains subject to the operation of rule 6 (2.), and is forbidden to supply milk to "any creamery other than a creamery of the society or to any company, society, person or persons who sells milk or manufactures butter for sale." This is a very sweeping interference with the right to dispose

of his commodities which every subject has. Until the committee consent to the transfer of his shares he is restrained not merely from supplying any other creamery with milk, but also from supplying with milk any society or person who sells milk or manufactures butter for sale. The member is put absolutely at the mercy of the committee, and may remain unable to supply milk to any dealer except the society for an indefinite time, which might extend to the whole of his life. The committee might, and probably would, in very many cases consider that it is in the interests of the society that the member should not be permitted to withdraw, and there would be, to say the least of it, very great difficulty in compelling their consent.

So long as he remains a member, the rule provides that that member who commits a breach of the rule shall pay to the society "as and for liquidated damages and not by way of penalty" the sum of 1s. per cow per day for every cow's milk sold contrary thereto. These liquidated damages might run up to a very high figure. In all the cases in which proceedings have been taken for the recovery of damages under this rule these damages appear to have been claimed as "liquidated damages." There is no trace of evidence of actual damage being required, and indeed it is not easy to see how such evidence could be obtained. Mr. Conner, the leading counsel for the society, argued that this rule was not and could not be effectual in making these sums liquidated damages. This view seems never to have been put forward on behalf of the society on any previous occasion nor in the course of the present case until it came to your Lordships' House. But assuming the provision for liquidated damages to be as futile as it is now asserted on behalf of the society that it is and always has been, so that clause 6 (2.) must be read without these concluding words, the objection that the rule operates in restraint of trade is not removed. The edge of the rule is less sharp, but it puts the members in the position of having covenanted not to sell their milk to any dealer other than the society for a period which may be indefinitely prolonged.

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Rules such as this have been on three occasions before the Courts in Ireland.

In *Hanley's Case* (1) judgment had been recovered for 25*l.* as liquidated damages under a rule very similar to that now under discussion. The scope of the rule in that case was, however, unlimited. It applied to milk from cows in any part of the country, while in the present case it is confined to cows in the particular district where the society carries on its operations. The Court of Appeal held the rule bad as in restraint of trade, and laid stress on the fact that there was no restriction of the area over which it was expressed to operate.

In consequence of this decision the rule was amended by confining the area of its operation, and the amended rule came under the consideration of Ronan L.J. on Civil Bill in the *Athlacca Case.* (2) The Lord Justice held that the decision in *Hanley's Case* (1) did not apply owing to the alteration in the extent of the application of the rule, and, with reference to the point made that the restriction might be perpetual, he stated that he could not see that this was not essentially necessary for the protection of the society.

The amended rule (in the same form as rule 6 (2.) now under consideration) came before Madden J. and Pim J. and the Court of Appeal in the *Coolmoyne Case.* (3) They held that the alteration in the rule had relieved it from the objections which had prevailed in the *Hanley Case* (1), and that the 20*l.* claimed was recoverable.

In the present case the Court of Appeal were of opinion that the *Coolmoyne Case* (3) was binding upon them, and that it was indistinguishable. They overruled Barton J., who had held that the fact that the plaintiff in this case had not himself consented to the rule, and that it was imposed upon him against his will by the vote of the majority, constituted a material distinction between this and the *Coolmoyne Case.* (3) On this particular point I think the Court of Appeal were right. However carried, when once the alteration has been

(1) [1912] 2 I. R. 586. (2) 49 I. L. T. 233.
(3) [1917] 2 I. R. 107.

effected the question must be whether the rule is or is not ultra vires, and this must be determined apart from the question whether any particular member concerned has or has not assented to the rule. When the alteration has been made by the necessary majority all members are put on the footing of having entered into a covenant to observe the rule. The question always must be, is the rule intra vires or is it bad on the ground of illegality or on any other grounds ?

In the present case I am of opinion that the rule is illegal, as an unreasonable restraint of trade, and therefore ultra vires and void. I may refer to what was said by James V.-C. in the *Leather Cloth Co.* v. *Lorsont* (1), in a passage quoted with approval by Lord Atkinson in *Herbert Morris, Ld.* v. *Saxelby* (2) : " All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract. The principle is this : Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market ; and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the Court is not unreasonable, having regard to the subject matter of the contract."

The present case is really governed by the principle there enunciated that " public policy requires that every man

(1) (1869) L. R. 9 Eq. 345, 353. (2) [1916] 1 A. C. 688, 700, 701.

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shall be at liberty to work for himself and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into." This is equally applicable to the right to sell his goods.

It is for the party who alleges that there are circumstances sufficient to outweigh the policy of the law against restraint of trade to establish this. "The onus of proving such special circumstances must, of course, rest on the party alleging them": *Per* Lord Parker. (1) Such restraint must be reasonable in the interests of the parties; that is, "it must afford no more than adequate protection to the party in whose favour it is imposed" and it must not be injurious to the public. (1) I desire to add one more quotation from Lord Parker by citing a passage from the judgment of the Judicial Committee delivered by him in the case of the *Attorney-General of Australia* v. *Adelaide Steamship Co.* (2): "Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits."

The present case may be tested by the light of these principles, which are thoroughly established as law in England and Ireland. For the successful working of co-operative societies of this kind it is in the highest degree desirable that a steady supply of milk should be assured for the manufacture of butter and cheese. The supply is got from the members, and no one could object to a provision, say, that before withdrawing his supply from the society a member should be bound to give the society reasonable notice. But the combined operation of the rules to which I have referred goes far beyond what is reasonably necessary for the protection of the society. How can it be necessary that without any

(1) [1916] 1 A. C. 707. (2) [1913] A. C. 781, 795.

power of withdrawal a member should be restrained from supplying milk to other dealers unless and until he can get the consent of the committee to a transfer of his shares? Such a provision is in my opinion unreasonable and might be oppressive in the highest degree. It far exceeds anything required for the reasonable protection of the society's business, and on the principles which have been repeatedly affirmed by this House and by the Judicial Committee of the Privy Council it is not enforceable.

In my opinion the appeal should be allowed with costs here and below, and a declaration should be made as prayed that rule 6 (2.) is illegal as in restraint of trade.

LORD ATKINSON. My Lords, the main facts have already been stated and the Irish decisions examined. I only refer to them therefore so far as is necessary to make what I am about to say intelligible.

The restraint of trade complained of in this case does not originate in any contract of service, nor in any sale of the goodwill of a business. No question arises as to the disclosure or use of trade secrets, or the enticing away by a former employee of the customers of his former employer. Still less does any question arise as to competition in trade set up by a retired member of a firm against the remaining members who continue the partnership trade, and are entitled to the goodwill of the partnership business. The restraint of trade complained of here is alleged to be imposed by rules made in 1916 by the respondents, an incorporated society, as it, admittedly, is, in relation to the supply to it by a certain class of its members of milk, the raw material of the industry of manufacturing butter, which the respondents were incorporated to carry on.

The respondent society was on March 6, 1903, duly registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39). Immediately upon its registration it became a body corporate by its registered name, having perpetual succession and a common seal, with power to hold land and buildings, its capital being divided into shares with

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limited liability. By s. 10 of this Act it had power to make and amend rules on the subjects mentioned in the second schedule of the Act, including the determination of whether their shares, or any of them, should be transferable, the form of transfer and registration of the shares, and the consent of the committee thereto, the determination of whether the shares, or any of them, should be withdrawn, the mode of withdrawal, and the payment of the balance thereon, and the determination of how members might withdraw from the society. By s. 22 of this same Act it is provided that the rules of the society shall bind the members and all persons claiming through them to the same extent as if each member had subscribed his name and affixed his seal thereto, and there was contained in the rules a covenant on the part of the member, his heirs, etc., to conform thereto subject to the provisions of the Act.

The case has, it would appear to me, been dealt with in the Court of Appeal in Ireland as if the appellant, being a member of this society, was bound to submit to any rule which the society, a persona in law distinct from its members, choose to make, whether that rule was designed to protect, to a reasonable extent, some interest the society was entitled to have protected, or was merely designed to shield it from competition in trade per se. The public is interested in every one of its members having freedom of action to carry on his trade or business, and deal with the property invested in that trade, within the law, as it seems good to him. The deprivation of the subject of that liberty of action in any given instance is, prima facie, an injury to the public interest, and, if it is to be excused or justified, must be excused or justified on the ground that it affords no more than adequate protection to those interests of the private parties concerned which they have a right to have protected. Competition per se is not one of the things which, however lucrative, a trader is entitled to be protected against. See *Herbert Morris, Ld.* v. *Saxelby* (1), and especially *Trego* v. *Hunt.* (2)

(1) [1916] 1 A. C. 688, 700, 702.

(2) [189] 6A. C. 7, 20, 24.

Two sets of rules, the special rules and the general rules, which were subject to the special rules, were in force at the time the appellant became a member of this society, and up to the time the new rules were framed and promulgated on February 1, 1916, continued to be so.

The appellant, when he became a member of the society, by the provisions of s. 22 of the Act of 1893 covenanted that the society should have power to alter any rules made dealing with the matters mentioned in the second schedule to the Act. Those rules stand, I think, to the society very much in the relation in which the articles of association of a limited liability company stand to that company. And accordingly the covenant of the appellant by no means implies that he should be bound by rules not dealing with the internal affairs and management of the society, but, though touching upon the subjects mentioned in this schedule, extend much beyond those internal affairs and this management.

I do not think that any help to the solution of the questions emerging for decision in this case can be obtained by comparing this society to a partnership in which before its creation or while it exists the partners may agree to carry on their trade on any terms they please. It is not a partnership. Its true analogue is a limited liability company, and so close is the resemblance between the two in structure and operation and the rights and obligations of their respective members that by ss. 54 and 55 of the statute each may be converted into the other by a special resolution. In order, therefore, to determine what was the aim, and what the intended operation of the new rules of February, 1916, it is essential to consider what was the aim, and what the operation of the earlier special and general rules theretofore existing, and the progress and success of the business of the society while acting under these earlier rules.

The general rules provide that the society shall consist of special members and of all such other persons as the special rules direct, or the committee (which means the committee of management) may admit. Each individual must hold at least one transferable share. Every application for admission

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as a member is to be considered by the committee, and, if approved of, the name of the applicant is to be added to the list of members. Minors and married women are eligible as members. The committee of management are to be elected by the members. By rule 13 of the special rules it is provided that should any member of the committee, with the consent of the committee, become surety for any debt or liability of the society he shall not be removed from office without his consent until this liability has ceased. This last rule has, in the events which have happened, tended to make the members of the present committee permanent. By general rule 19 it is provided that a person whose shares shall be transferred, repaid or forfeited shall cease to be a member. All shares are transferable. And general rule 45 provides that any shares may with the approval of the committee be transferred by one member to any other member at the option of the transferor, but if the transferee should not be a member of the society he must be approved of by the committee, or by the committee and a general meeting according to the provisions of the rules relating thereto, before the transfer can be registered; and if the rules require a member to hold more than one transferable share the transferee must acquire by transfer, or by transfer and allotment, the number so required before he can be registered.

If a sum be due in respect of a share, the committee, if the sum has been in arrear for three years, may declare the share to be forfeited. This forfeiture may be remitted if the sum due be paid in manner provided.

No method is provided by the general or special rules by which the committee can be compelled to consent to the transfer of a share. And a member could never escape from any fetters imposed upon his freedom of trading by transferring his shares unless the committee consented to the transfer. By no independent act of his own could he free himself. This was not a matter of so much importance while the old rules remained unaltered, because of the slight restraint they imposed upon the members. Sect. 20 of the special rules ran thus: "Any member who shall supply

milk to any creamery other than that owned by the society *for the space of three years* from the date of his admission to membership *without the consent in writing* of the committee, shall *forfeit his shares, together with all money credited thereon.*"

It is clumsily drafted. It obviously means that during the first three years of the society's existence its members should supply their milk to the creameries of the society, and to those alone, but that after this stage of infancy had been passed the members might supply their milk to any other creamery they chose. The three years would expire in 1909—many years before the new rules were framed.

Mr. John Byrne, the secretary and manager of the society, admitted in cross-examination that under the old rules, i.e. the special and general rules, the society was, up to the framing of the new rules, prosperous, was going on well, was able to hold its own in competition with other creameries; that (referring evidently to the old rule 20) at the end of three years on equal terms a business enterprise should be able to walk on its own feet if properly managed, though there was competition against it. He then said it would prosper infinitely more rapidly if all the members would remain liable. By the words "equal terms" he referred to the fact that they found special prices had been offered to some members to take them away, and that by these words he meant "competition by the offering of special prices." The respondent society was affiliated to the Irish Agricultural Organization Society, and therefore is under the rules of that society one of the group of creameries under the control of the Irish Creamery and Butter Control. There are other creameries in the district called, apparently, proprietary creameries. In the year 1916 the committee had, Mr. Byrne further said, borrowed from the bank a sum of close on 1500*l.* for the purpose of making loans to members to buy manures and seeds and feeding-stuffs in the spring of the year, till such times as the milk supplied by them should pay it off again. When milk was sent in by a member who had got an advance, the price of it was not paid to him; the amount was credited to him against his debt, but the cash which but for that debt

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would have been paid to him was paid into the bank. While this debt is due from the members of the committee to the bank, these latter are, under rule 13 of the special rules, immovable. Mr. Byrne proceeds to state why the new rules were passed, and what were the objects they were directed to effect. He says that in October or November of the year 1915 farmers living in the district of Gortatlea, a town about three miles distant from the centre of the district described in para. 5 of the new rules, were anxious to have a creamery there, that a deputation of those farmers waited upon the committee of the respondent society, and terms were arranged between them, that the terms were that these new rules should be adopted, which bound members to sell milk to their own society. The rule, he said, was necessary to protect the society against unscrupulous competition; what he meant by unscrupulous competition is shown by the next sentence. "To protect," he said, "the society against the competition of those who may pay a special price for the purpose of killing the new branch in its infancy." He adds, "Or reducing the members of the society to the proprietary creameries." The word "reducing" is, I think, a misprint for the word "introducing."

He was asked if the impeached rule gave his creamery any advantage in respect of controlling the quality of the milk sent to his creamery, and his answer is: "Yes, it assists us in being more independent, we can send the milk back if not clean; we can refuse it, and they cannot go to the proprietary creameries next day."

Further on he said that the branch at Gortatlea cost 800*l*., that the new rules compelled members, if offered a better price by a rival creamery, to sell to the respondents; that this was not the object of the rule, but to protect the society in its outlay of capital against unfair trade competition. Further on he says the object of the rule was to keep the people together to make the society a strong society, to prevent disloyal members from grasping at fancy prices for the time being.

It is as plain to me as anything can be that the main object

—if not the sole object—which the respondent society desired to effect by these new rules was to protect themselves from the competition of proprietary creameries. The secretary chooses to style competition which consists in one's rival in trade offering a better price for a needed commodity than the price offered by oneself as unscrupulous and unfair competition. The law, however, does not so regard it. It is perfectly legitimate competition. The crippling or defeating by the society of the competition of its trade rivals in this manner may be a lucrative thing for it. That, however, does not alter the law. The gain, I think it will appear, is made by the sacrifice of the pecuniary interest of its members.

These being the objects the society designed to effect by making these new rules, one has next to consider to what extent it has gained its end. Rule No. 5 of the new rules provides that the society shall consist of the special members and of persons resident in, or occupying grazing land in a very extended area of the county Kerry comprising eighty-six townlands, and of such other societies registered under the above-named Act, wherever situated, as the committee of management may admit to membership. The possession of cattle or of land is not a necessary qualification for membership.

The impeached rule, namely rule 6, of the new rules, deals with a particular class of members, namely those having milk for sale produced by the members' cows, kept or grazed on any lands within the area comprising these eighty-six townlands. And by the first sub-section of rule 6 the society binds itself so long as it shall have a creamery working to accept this milk, provided it be delivered fresh and in good condition at the creamery of the society at such times as the committee shall appoint, and shall pay for the same at the current rate fixed by the committee for milk supplied to the creamery by members. And further binds itself in the case of default by it to pay to the member in respect of whom the default is made, as and for liquidated damages and not as a penalty, the sum of 1*s.* per cow per week for every cow's milk not accepted.

By the next sub-section of this rule, it is provided that

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after the society shall have started a creamery for its members, no individual member so long as he continues to be a member who shall have milk to sell, the produce of a cow or cows kept or grazed on lands within the aforesaid area, shall, without the written consent of the committee first obtained, sell any such milk to any creamery, other than a creamery of the society, or to any company, society, person, or persons who sells milk or manufactures butter for sale, and that any member who commits a breach of the rule shall be bound to pay to the society, as and for liquidated damages and not by way of penalty, a sum of 1*s.* per cow per day for every cow's milk sold contrary thereto. That is, that the committee shall themselves fix the price of the milk they consent to purchase, be it much or little, and that any members who may sell milk to any body or person who is more than a mere consumer shall come within the reach of this penal clause. Mr. Conner is too good a lawyer to contend that these so-called liquidated damages were other than a penalty. He admitted it was a penalty. But that admission seems to have been made for the first time at the Bar of your Lordships' House. And it is clear from the evidence of Mr. Byrne, the secretary, that the society did not so regard it.

At p. 131 of the Appendix he appears to have been asked on cross-examination by Serjeant Sullivan, who had made a calculation as to what Scanlan, an offending member, would have to pay per cow at the rate prescribed: "But if he sells elsewhere he will have to pay 800*l.* a year?" And the answer is: "That is his contract as I understand it." Then follows a proviso to the rule which is peculiarly oppressive. It provides that, instead of proceeding for damages as above provided, the committee may refuse to purchase the milk of any member who shall commit a breach of the terms of clause 2 of the rule. So that if a member should sell a gallon of milk to a dairy which re-sold milk, or a few gallons to a neighbouring farmer who was short of milk and wanted a small quantity of butter to fill up the firkin he was making up for the market, all the milk of this member might be thrown on his hands.

A question was raised upon the meaning of the words "having milk for sale," occurring in rule 6. It was contended that this phrase included milk which, at the time the rules were promulgated, the member had already bound himself by contract to sell to some person or body other than the society. If that were its true meaning, I think there would be much in Mr. Brown's contention that the appellant, being an existing member at the time the new rules were made, might be required to commit a breach of contract and, therefore, that the rules dealt with something beyond the internal affairs and management of the company and were ultra vires and void. I do not think, however, the words "*having milk to sell*" bear that meaning. I think they mean "having milk which he is *free to sell*" to the society, and do not include milk which the member has already contracted to sell to some other person or body.

My Lords, I think this rule No. 6, interfering as it does with the individual liberty and freedom of action of the members of this society in their trade or business, and the legitimate use and employment of their property, is prima facie contrary to public policy and the public interest, and is void as being a restraint of trade. The question is, does it come within one of the exceptions mentioned by Lord Macnaghten in the *Nordenfelt Case* ? (1) Is the rule reasonable in reference to the interest of the parties concerned (in this case the society and its members) ? Is it also reasonable in reference to the public interest ? Is it so framed and so guarded as to afford adequate protection but nothing more than adequate protection to the party in whose favour the restraint is imposed, while at the same time it is in no way injurious to the public ?

My Lords, I think the rule offends in every way in one of these respects. It is harsh, oppressive and unjust in its operation, especially to those persons who, like the appellant, are producers of milk and were members of the society before the rule was made. It shuts out the products of the industry of this class from almost every market.

(1) [1894] A. C. 535, 565.

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It practically requisitions their products, paying for them such a price only as their own committee may choose to fix. That is confiscation in essence. It makes it impossible for these members by an independent act of their own to free themselves during their lives from the fetters the rule has thus fixed upon them. It is designed to protect, and does protect, the society against a menace to its trade against which in the public interest it has no right whatever to be protected, namely, free and open competition. A rule much more restricted in scope, and less oppressive in operation, would, as is evident from the society's success under rule 20 of the special rules, adequately guard and protect all its legitimate interests. Such a rule for instance as required that members who undertook to supply milk to the society's creameries should be bound not to discontinue the supply when they had milk available without six months' or twelve months' (as they might determine) previous notice in writing. If that be so, as I think it is, then I protest against the notion that this society can save a rule such as this from condemnation by saying to an aggrieved and complaining member: "You have contracted that we should have power to alter the rules: we have altered them. If you do not like to suffer under them as altered, transfer your shares and clear out." I do not think the society has any right whatever to put such an alternative to any member. A share in such a society may be a comparatively worthless thing; at all events it is property. I do not think that a member is in any way bound either to get rid of it, or to submit to an oppressive, ultra vires or illegal rule. Therefore, if the committee were ever so ready to consent to a transfer of the appellant's single share, that fact might make the rule less oppressive in operation no doubt, but, in my view, it would not make it the less illegal. The committee have never, in fact, offered to consent to the transfer of the appellant's share. The appellant never asked them to consent to it, but I do not think it is irrelevant to examine the provisions contained in the new rules touching the question of the transfer of shares.

Rule 21 of the new rules deals with transfer. Every share

is made transferable. No share is to be withdrawable. A member may, with the consent of the committee of management, transfer his shares to any person upon giving one month's notice in writing to the secretary stating the full name, place of residence, and occupation of this person, the number of shares intended to be transferred, and the consideration for the transfer, but the committee is not to be bound to assign any reason for refusing to sanction any transfer of shares.

For all practical purposes this rule places the shareholder absolutely at the mercy of the committee, and at their option binds him to the society for life. Even if they were prima facie compellable to consent to a transfer, they are not compellable to do so if they bona fide refuse to consent to it in what they believe to be the interest of the society, and if they refuse to state their reasons it is to be assumed that they refused bona fide for reasons they deemed sufficient: *Nelson Mitchell* v. *City of Glasgow Bank* (1); *In re Coalport China Co.* (2); *Ex parte Penney* (3), so that for all practical purposes the member, if the committee refuse to consent to a transfer, becomes bound for life.

It has been held, however, that the fact that a restraint on trade is imposed for an indefinite time does not necessarily render it unreasonable and void: *Wallis* v. *Day* (4); *Hitchcock* v. *Coker* (5); and *Haynes* v. *Doman.* (6)

Still, in my view, this point might in the particular circumstances of a given case be involved in the question whether the restraint afforded no more than reasonable protection to the person in whose favour it was imposed. In *Horwood* v. *Millar's Timber and Trading Co.* (7) a restraint was held bad as contrary to public policy, inasmuch as it unduly and improperly fettered the liberty of action of the mortgagor (i.e. the person on whom the restraint was imposed) in the free use of his property. And the Master of the Rolls in giving judgment referred to what he had laid down in *Saxelby's Case* (8), in which this House concurred. It meant, he said (9),

(1) (1879) 4 App. Cas. 624.
(2) [1895] 2 Ch. 404.
(3) (1872) L. R. 8 Ch. 446.
(4) (1837) 2 M. & W. 273.
(5) (1837) 6 Ad. & E. 438.
(6) [1899] 2 Ch. 13.
(7) [1917] 1 K. B. 305.
(8) [1915] 2 Ch. 57.
(9) [1917] 1 K. B. 311.

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"that considerations of public policy must be had regard to, and that it is no answer to say that an adult man, as to whom undue pressure is not shown to have been exercised, ought to be allowed to enter into any contract he thinks fit affecting his own liberty of action. I think that is not the law."

The case of *Joseph Evans & Co.* v. *Heathcote* (1) is a peculiar but very instructive one. There the plaintiffs, manufacturers of "Cased Tubes," were members of a trade combination called the Cased Tube Association. The defendants, who were also manufacturers of "cased tubes," were the members of this same association other than the plaintiffs. The object of the association was the regulation of the prices in that trade. In furtherance of this object it was provided by the rules of the association that each member should be restricted in the output of "cased tubes" to a certain fixed percentage of the total output of the members, the percentage being based on the members' actual output in the preceding years. Each member whose output in any month exceeded the percentage was required to pay the profits of this excess into a pool, while each member whose output in any month was less than this percentage was to receive a percentage out of the pool. The rules provided that each member should sell their cased tubes only upon the terms and at the prices which should from time to time be fixed by the association. No means were provided by which a person who once joined the association could be retired from its membership. By an agreement made between the plaintiffs, the defendants and certain other firms, the plaintiffs, in consideration of the defendants fixing their percentage at a certain figure, agreed not to sell their cased tubes to any persons other than these firms. And the firms on their part agreed not to purchase cased tubes from manufacturers other than the members of the association. The agreement further provided that it should continue in force as long as the association and a certain other society over which the plaintiffs had no authority continued to contro

(1) [1918] 1 K. B. 418.

prices. For several months the plaintiffs' output was less than their percentage, and they therefore became entitled to receive from the association a sum of money out of the pool. Though the secretary of the association furnished the plaintiffs each month with an account showing them how much they were entitled to for that month, they were not paid, and brought an action to recover the amount so due. The defendants pleaded that the action was not maintainable on the ground that the rules of the association of which they were members, and the agreement of June, 1913, to which they were parties, were illegal as being in restraint of trade. It was held that the restraint imposed by the agreement and the rules was unreasonable as between the parties, and that therefore the agreement was invalid at common law, and that the plaintiffs could not recover on it. It was further held that the association was a trades union and that the agreement was within the protection of ss. 3 and 4 of the Trade Union Act, 1871. This last point is immaterial for present purposes.

The peculiarity of the case was that the defendants were refusing to pay on the ground that the restrictions imposed upon the plaintiffs, to which the plaintiffs did not object, were unreasonable and oppressive.

In face of this decision, which in my view is absolutely right, it seems vain to contend, as apparently was contended in some of the Irish cases, that adult parties can enter into agreements to trade upon any terms they please, and that none of them can get relief from any contract they so enter into although it imposes upon them a restraint in trade.

The last matter I wish to refer to is the arbitration clause, rule 69 of the new rules. It is not a clause to the effect that the holding of an arbitration shall be a necessary preliminary to recourse to a court of law. It is designed to oust the jurisdiction of the courts of law altogether, since it provides that the award shall be final. The arbitrator is the committee of the organization to which the respondent society is affiliated, and which, through one of its committees, has control over the respondent society. But the words disputed in this clause do not, I think, cover the controversy in this case,

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namely, whether these rules of February, 1916, are ultra vires void and unenforceable in law. I think the plaintiff is entitled to the relief he prays for and that the decision appealed from was wrong and should be reversed, that the decision of Barton J. was right and should be restored, and that this appeal should be allowed with costs here and below.

LORD SHAW OF DUNFERMLINE (read by LORD ATKINSON). My Lords, the society of which the appellant is a member, and whose new rules are in question in this appeal, was registered in the year 1903 under the Industrial and Provident Societies Act of 1893.

By s. 21 of that Act the registration of the society renders it a body corporate "with perpetual succession and a common seal, and with limited liability." By s. 60 of the statute this limitation of liability is worked out in the usual manner in the case of contributories by the provision of sub-s. (*d*):— "No contribution shall be required from any individual society, or company exceeding the amount, if any, unpaid on the shares in respect of which he or it is liable as a past or present member."

By the general rule of the society No. 120 it was provided that any rule not declared to be fundamental "may be rescinded or altered or any new rule be made by a majority of two-thirds of the members present at any special general meeting." The appellant joined the society as a member when the original rules, without alteration, were in operation. He entered into a contract for a three years' supply of milk from his farm to the society. The original special rules appear to have worked well, and a contract of the kind made with the appellant appears also to have worked well in the interests of all parties.

New rules were adopted on February 1, 1916. They contained certain very serious alterations of the rights and, in particular, of the obligations of members of the society. These alterations raise the questions in this appeal. The challenge brought against them is, inter alia, that they are

not enforceable against the appellant as being contrary to public policy by reason of the restraint of trade which they contain, a restraint which is not justified by law as being necessary for the protection of the society's rights under its contract of membership with the appellant.

I am of opinion that this challenge is sound, and that the law cannot be invoked for the enforcement of the new bargain attempted to be set up by the new rules.

It may be explained that under the original special rule No. 20 of 1903 "Any member who shall supply milk to any creamery other than that owned by the society, for the space of three years from the date of his admission to membership, without the sanction in writing of the committee, shall forfeit his shares, together with all money credited thereon." The new rule, No. 6 of 1916, has been cited at length in the judgments of your Lordships which have preceded my own. It is of a severe character, and it is fair to the society to say that its provisions are stringent also against the society itself. Thus it is all the more necessary to examine with care the proposition that the restraints laid upon the freedom of trade of the individual member are not enforceable.

These are contained in the second part of rule 6. Under the first part the society became bound to take the milk at a price or rate "fixed by the committee" for milk supplied by members. Under the second part it provided that no member of the society having milk to sell from cows kept on his lands within the area defined should, without the committee's sanction, sell any such milk "to any creamery other than the creamery of the society or to any company, society, person, or persons who sells milk or manufactures butter for sale." A member breaking the rule was to pay to the society "as and for liquidated damages, and not by way of penalty the sum of one shilling per cow per day for every cow's milk sold contrary hereto." It was provided further that instead of proceeding for damages the committee might refuse to purchase the milk from the cows of the offending member. In a word, the result was, of course, to exclude the appellant from the open market, the society having the duty of buying

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and the right to buy at its committee's price, with the alternative punitive right, just mentioned, of refusal to buy. The sanction of the rule was of extreme severity; liquidated damages of 1*s.* per cow per day for every cow's milk sold contrary to the rule. This rule was to bind members not for a period of months or years but during their membership.

With regard to membership, however, another drastic alteration from the original rules was made. Under the latter, a contravention of the rules by a member operated as a forfeiture of his shares, and, accordingly, a cessation of his membership. He was thus set free from the society, but of course subject to any claim by it in respect to a breach of any contract made by him. But under the new set of rules it is provided that any member whose shares have been transferred or cancelled shall cease his membership; but "he shall not otherwise be entitled to withdraw from the society." This transfer or cancellation however is a matter in which the committee of the society has complete control. No transfer is effectual except with the consent of the committee of management, and "the committee shall not be bound to assign any reason for refusing to sanction any transfer of shares."

My Lords, I should be the last to question that the new rules were framed with a praiseworthy intent, or that the administration thereunder, supervised, as it undoubtedly is, by the Irish Industrial Organization Society, is intended to be in the public interest. But we are in the region of contract; and the sole question for the consideration of the House is whether the new rules which I have thus briefly sketched do or do not form an invasion of that system of contract beyond the point which public policy will sanction.

In order to test this question—and no less test can be satisfactory—it is necessary to assume that these rules may be put in force against the appellant to the full extent and rigour of their terms. In the result accordingly it will be observed that, under the new rules as framed, the appellant is, in a matter involving his whole industry and daily occupation, bound for life. His release is at the option of

a committee for whose conduct no reason need be assigned, and against whose conduct no challenge can be made except that it was moved by bad faith. And the onus of establishing this grave charge would rest upon the appellant.

I am satisfied that the new rule in the ordinary case, if put in operation against the appellant and apart from such release, would apply substantially as I have said to the whole of his industry. He might remain for life under obligations which would continue until his ruin had been accomplished, or the society moderated its terms, or allowed him to escape.

In circumstances such as these, my Lords, this instance of restraint of trade being so extreme as that which I have indicated, the sole question is whether such restraint was justified in order to protect the interests of the society which imposed them. So far as finance and rights of property are concerned, the contract between the society and the appellant was one under which his liability was limited to the amount of his shares. It is not, of course, contended that such liability has anything to do with the present restraint.

The further remainder of the purpose would appear to be this, that looking to the different objects in view, and particularly to the advantages of co-operation in industry by the manufacture of butter and cheese from milk, it was legitimate that both parties to this contract, i.e. the society as a whole and the individual member, should agree to enter into a bargain for the supply of milk for a term of years. This, my Lords, appears to me to be an interest in the protection of which the law would not in any ordinary circumstances interfere. Speaking for myself, I may say that the three years' contract of supply which was originally attached as a condition of membership, and which in experience fortunately turned out well, was in my view within the law. Questions of degree may have to be considered in all such cases; but in the present case, my Lords, I am of opinion that the interest of the parties to a contract implied in the membership of such a society cannot be extended to justify the new rules which I have cited. These rules appear to me in their

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construction to involve not only conditions which might be financially equivalent to ruin, but to form a restraint on the industry and trade of the appellant which would be equivalent to a bondage in the nature of slavery for life. None of the cases which have occurred in recent years in this House, where the whole authorities have been overhauled, can be cited to justify the enforceability of such a restraint. I recognize the difficulty in which the Court below was placed, in view of the decisions in the *Athlacca* (1) and *Coolmoyne* (2) cases; but, for the reasons stated by your Lordships who have preceded me, I think these decisions to have been unsound.

On the general question, my Lords, that is raised, of the restraint of trade, of its principles and of its limits, I have expressed myself so fully in the recent cases of *Mason* v. *Provident Clothing and Supply Co.* (3) and *Herbert Morris, Ld.* v. *Saxelby* (4) that I will make so free as merely to refer to what I there stated. Unless this House is to embark afresh upon these difficulties, and unless further some unsettlement should take place of the principles laid down in them, and in *Attorney-General of Australia* v. *Adelaide Steamship Co.* (5) it does not appear to me to be necessary to say more with any advantage. That these cases apply in complete support of the appeal I have no doubt.

My Lords, I agree with the motion which has been proposed.

LORD PARMOOR. My Lords, I regret that I am not able to concur in the judgments which have been delivered by your Lordships, although in agreement with the opinion that the principles of law applicable have been fully ascertained. The difficulty arises in applying these principles to the particular conditions which prevail in the present appeal.

The respondent society was registered on March 6, 1903, under the provisions of the Industrial and Provident Societies Act, 1893. The appellant became a member of the respondent society on October 5, 1903, and still continues to be a member

(1) 49 I. L. T. 233.
(2) [1917] 2 I. R. 107.
(3) [1913] A. C. 724.
(4) [1916] 1 A. C. 688.
(5) [1913] A. C. 781.

thereof. Towards the end of the year 1915 the respondent society took steps to alter their rules. On December 7 a special meeting was held to consider the adoption of a complete amendment of the existing rules, and a resolution was carried in favour of an amendment. A further special general meeting was held on January 18, 1916, and at this meeting the resolution, passed on December 7, 1915, was duly confirmed. On February 1, 1916, the new rules were duly registered by the Registrar of Friendly Societies in Ireland.

The appellant, who is a farmer residing at Ballydwyer, Ballymacelligott, in the county of Kerry, did not assent to the said amendment of the rules. Ninety-three members, holding shares to the value of 987*l.*, voted in favour of the resolution, while fourteen members, holding shares to the value of 146*l.*, voted against it.

The appellant, suing on his own behalf, and on behalf of other dissentient members, who voted against the adoption of the amended rules, commenced an action on February 3 claiming :

(1.) A declaration that certain rules recently adopted by the respondent society, and registered on February 1, 1916, in particular rule 6 (2.) and rule 16, were not binding on the appellant and the other members of the society as being :

(*a*) improperly adopted to the prejudice of the appellant and other members ;

(*b*) illegal, as in unreasonable restraint of trade ;

(*c*) ultra vires the defendant society.

(2.) An injunction to restrain the respondent society from acting upon or putting in force the said rules.

After service of the writ of summons the respondent society claimed to have the action stayed on the ground that the rules of the respondent society provided that disputes between members should be decided by arbitration. This motion was refused by Pim J., whose order was affirmed by the Court of Appeal in Ireland on February 29, 1916. The same question was raised again on the trial of the action, but it was held that the question being one of ultra vires, as regards the powers

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of the respondent society, it was properly a question for the Court and not for arbitration. On the hearing of the appeal this question was not seriously argued, and in my opinion the dispute which has arisen between the appellant and the respondent society cannot be regarded as coming within the arbitration clause in the rules. I agree in the judgment of *Heard* v. *Pickthorne* (1), and the present case appears to me to come directly within the principle which that judgment affirms.

The main question raised in the appeal is whether certain rules registered on February 1, 1916, are ultra vires, and not binding on the appellant, and other dissentient members, as being an unreasonable restraint of trade and therefore contrary to public policy. When the case came before Barton J., the trial judge, the case of *Coolmoyne Co-operative Creamery* v. *Bulfin* (2) had been decided by the Court of Appeal in Ireland, and rules identical with those now under consideration had been upheld. Barton J. found in favour of the appellant on the ground that it was not possible to attribute to him or other dissentient members an implied agreement to surrender his or their judgment to the vote of a majority, and that the conditions of the amended rules to which the appellant objected could not be imposed upon him in invitum. The agreement which Barton J. held unreasonable and void was not the rule, but the alleged agreement which it was sought to attribute to every member of the respondent society that he would be bound by any and every new rule in restraint of trade, without having an opportunity of exercising his free judgment upon its reasonableness, from his point of view, and upon the adequacy of the consideration which it offered to him. When the case came before the Court of Appeal in Ireland it was recognized that that Court was bound by its former decision as to identical rules in the *Coolmoyne Case* (2), and the argument was directed to the question whether or not the amended rules were binding on the plaintiff. In s. 22 of the Industrial and Provident Societies Act, 1893, it is enacted that the rules of a registered

(1) [1913] 3 K. B. 299. (2) [1917] 2 I. R. 107.

society shall bind the society and all members thereof and all persons claiming through them respectively to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules a covenant on the part of such members, his heirs, executors, administrators, and assigns, to conform thereto, subject to the provisions of the Act. The effect is that the rules form the contract between the members and the society: *Auld* v. *Glasgow Working Men's Building Society.* (1) The rules of the respondent society contain a provision that any rules of the society not declared to be fundamental may be rescinded or altered, or that any new rule may be made, by a majority of two-thirds of the members present at any special general meeting. Where a person joins a society with power to make new rules, and new rules are duly made, the member is as much bound by the new rules as he was by the old rules, so long as they are within the powers of alteration possessed by the society. It makes no difference that he was one of a dissentient minority, and such alteration cannot be regarded as a breach of the contract which has been entered into between himself and the society: *Allen* v. *Gold Reefs of West Africa* (2); *British Equitable Assurance Co.* v. *Baily* (3); *Smith* v. *Galloway.* (4) The question therefore arises for decision in this appeal whether the case of *Coolmoyne Co-operative Creamery* v. *Bulfin* (5) was rightly decided, and the first point for consideration is the nature and meaning of the rules which constitute the contract between the appellant and the respondent society.

The objects of the society include the development and improvement, on co-operative principles, of the industry of dairying in Ireland, by carrying on the manufacture and sale of butter, cheese, and other milk products. The membership consists of special members, and of all such persons resident in, or occupying, or grazing, lands in certain townlands, and of such other societies registered under the Act, wherever situated, as the committee of management may

(1) (1887) 12 App. Cas. 197.
(2) [1900] 1 Ch. 656.
(3) [1906] A. C. 35.
(4) [1898] 1 Q. B. 71.
(5) [1917] 2 I. R. 107.

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admit to membership. No importance attaches either to the area of limitation or to the qualification for membership, but it is provided that no person carrying on any business similar to that in which the society is engaged shall be eligible to become, or continue as a member of the society. The effect of this would be that if the appellant set up business similar to that in which the society is engaged he would not be eligible to continue a member. Rule 6 (1.) and (2.) are important. Rule 6 (1.) places an obligation upon the respondent society so long as it shall have a creamery working, subject only to certain exceptions, to accept from any member, having milk to sell, all milk produced by such member's cows kept or grazed on any land within the area of membership, and to pay for such milk at the current price or rate, fixed by the committee, for milk supplied to the creamery by members of the society. In case of default there is a provision for payment of liquidated damages by the respondent society, but the so-called liquidated damages appear to be in the nature of penalties, and, if this is so, it would be incumbent on any member in case of default of the respondent society to prove what damages he had in fact sustained. Rule 6 (2.), which is one of the rules directly impugned, provides that after the starting of a creamery for its members by the society no individual member of the society, so long as he continues a member thereof, and has milk to sell, the produce of a cow or cows kept or grazed on lands within the defined area, shall, without the written consent of the committee first obtained, sell any such milk to any creamery other than a creamery of the society, or to any company, society, person or persons who sells milk, or manufactures butter for sale. There is a provision for liquidated damages, but as in (1.) the so-called liquidated damages appear to be in the nature of penalties, and, if this is so, actual damage would have to be proved. There is a proviso that instead of proceeding for damages the committee of the society may refuse to purchase milk of any member who shall commit a breach of the terms of rule 6 (2.). The result is that there is an obligation on the respondent society to accept the milk of the appellant, so long

as he is a member of the society, produced from cows within the defined area, and a corresponding obligation on the appellant, so long as he continues a member of the society, and has milk to sell from cows within the same area, not to sell it to any creamery other than a creamery of the society or to any company, society, person or persons who sells milk or manufactures butter for the sale, without the consent of the committee. It must, however, not be forgotten that if the appellant sets up a business similar to that in which the society is engaged, he is no longer eligible to continue a member of the society, and that, if the so-called liquidated damages are in the nature of penalties, only actual damages can be recovered at the instance either of the appellant or of the respondent society, and that the respondent society instead of proceeding for damages has the option to refuse to purchase the milk of the defaulting member.

The appellant is entitled to say that rule 6 (1.) and (2.) must be considered as one of a series of rules and with special reference to the terms of rules 16 and 21. Rule 16 provides that a member, all of whose shares have been transferred or cancelled, shall cease to be a member of the society, but that a member shall not otherwise be entitled to withdraw from the society. Under Sched. II. (7.) and (9.) of the Act of 1893 the society have power to make rules for the provision of the form of transfer and registration of shares and for the consent of the committee thereto and for the determination whether the shares or any of them shall be withdrawable and whether and how members may withdraw from the society.

The existence of this power is no answer to the allegation that the rules as a whole place an unnecessary restraint on trade, if such an allegation can be maintained, but it is clearly contemplated by the Legislature that rules might be framed in the form which the respondent society had adopted, and the mere adoption of such rules is not itself open to objection. Rule 21 provides for the transfer of shares and declares that a member may, with the consent of the committee of management, transfer all or any of his shares to any person upon giving notice in writing to the secretary, stating the full

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name, place of residence, and occupation of the transferee, the number of shares intended to be transferred, and the consideration for the transfer. The committee in refusing to sanction a transfer of shares is not bound to assign any reason, and there is a further provision that no shares shall be withdrawable. The result is that the appellant is unable to transfer his shares without the consent of the committee of management, and that, so long as the consent is withheld, he continues a member and is bound by the provisions of rule 6 (2.), subject only to the condition that if he carries on any business similar to that in which the society is engaged he is no longer eligible to continue as a member of the society. In this case no application has been made to obtain the consent of the committee of management, but, so long as they do not act capriciously, or without bona fides, the refusal of the committee of management to consent could not be questioned, and they are not bound to assign any reason for refusal. I will assume that the consent of the committee to a transfer of his shares by the appellant would not have been given; but it is unfortunate that it was not sought to obtain the consent of the committee of management before the commencement of this expensive litigation. There is no reason that it might not have been given in the case of the appellant, and there is evidence that whenever a member has applied for a transfer it has been granted.

The rules referred to above constitute the contractual relationship between the appellant and the respondent society, so far as the contract is impugned as constituting an undue restraint of trade, and being in this respect contrary to public policy. Your Lordships are not considering the relationship of the members of the society, inter se, but of each member to the society. This relationship between the society and its co-operators is intended for their common benefit, and is in its character and inception voluntary. There is a close analogy to the relationship constituted in a partnership between an individual partner and the partnership firm of which he is a member. No one is compelled to become a member of the respondent society; but, if he does, he knows that there are rules which will be

binding on him, and that such rules may be altered if the prescribed conditions are followed. It makes no difference that the appellant was a dissentient to the alteration of the rules. He joined the society with power to alter its rules under prescribed conditions, and, so long as these conditions are observed, he is as much bound by the altered rules as he was by the rules in force at the time when he became a member. On this point I am unable to agree with the reasoning on which the judgment of Barton J. is founded. It is unquestionable that the contract does operate in partial restraint of trade, but a large number of commercial contracts are made with this object. The law does not sanction interference with the principle of freedom of contract unless the restraint is greater than is reasonably required for the protection of the covenantee, or, to put the test in slightly different language, a contract in restraint of trade is not invalid so long as the restriction is no more than an adequate protection to the interests of the party in whose favour it is imposed. The Court of Appeal in Ireland has decided that the restrictions sought to be imposed upon the appellant in favour of the interests of the respondent society are not unreasonable in degree, and after full consideration I find myself in agreement with this conclusion.

The contract to which the debate in this House has been directed is commercial in character, involving questions of business expediency. It raises questions essentially distinct from those which arise in the case of a contract to regulate the relationship between an employer and employee after the termination of a contract of employment, or a contract protecting the goodwill on the sale of a business. It is moreover a commercial contract of a special character entered into for the purpose of furthering a co-operative movement imposing mutual obligations, and conferring mutual benefits both on the co-operators and the society of which they are members. It will be convenient further to weigh the effect of this consideration at a later stage. It cannot be said that the contract is unilateral or one-sided. The consideration for the obligation on the appellant not to sell his milk purchased

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under the defined conditions, without the consent of the committee, to any other person than the respondent society is to be found in the obligation on the respondent society to purchase all such milk produced within the defined limits as the appellant may have to sell. So long as there is consideration in a contract of this character the Court does not consider the question of its adequacy, and it has been said that any attempt to do so would impose an impracticable duty on the Court. I think it is also true that in a contract of this character the parties should be regarded as the best judges of whether the restraints mutually imposed are unduly restrictive, but this rule is not so rigid as to prevent the interference of the Court in a particular case: *Heard* v. *Pickthorne* (1); *Herbert Morris, Ld.* v. *Saxelby*. (2) A further consideration is that the contract does not impose on the appellant anything in the nature of servile conditions or of personal restraint, and, as was stated during the argument, the contract was impugned not as containing conditions vicious in character, but conditions pressed beyond the degree required for the protection of the interests of the respondent society.

My Lords, I think that the contract should be considered as a contract of a distinctive character applicable to the relationships which arise between a co-operative society and any of its constituent members. The intention and purpose of the rules are to provide conditions under which with reasonable security a business can be instituted and carried on on a co-operative basis. The basic idea is co-operation. The restraint imposed ceases to be operative as soon as the appellant ceases to be in a position of a co-operator member of a co-operative society. No doubt this condition introduces an indefiniteness as to the length of the duration of the restraint, but such indefiniteness, unless unreasonably imposed, is not in itself an objection against the validity of the contract on the ground of public policy: *Wallis* v. *Day* (3); *Hitchcock* v. *Coker*. (4) What is the effect of the consideration that

(1) [1913] 3 K. B. 299.
(2) [1916] 1 A. C. 688.
(3) 2 M. & W. 273.
(4) 6 Ad. & E. 438.

the contract is applied in co-operative trading upon the argument of the appellant? In the first place it was said that the effect of the rule was to compel the appellant and other members of the society to sell all their produce at a price to be fixed, for the benefit solely of the respondent society, by the respondent society itself. This allegation is, in my opinion, based on a fallacy. In the first place the sale is not at a price to be fixed for the benefit solely of the respondent society but at a price to be fixed for the benefit of all members of the respondent society, including the appellant. No doubt this implies that no higher price can be paid than the financial stability of the respondent society may allow, but so long as there is no suggestion of improper conduct it cannot affect the validity of a contract whether at a particular moment the co-operative society is, or is not, in a flourishing condition. It was stated in the present case that expenditure had been incurred in the erection of a new creamery, but this is a matter of internal concern and does not affect the questions to be determined by your Lordships. No member of the society is subjected to the risk of selling his produce at a price dictated by an outside purchasing body, for the purpose of profit, and I can see no reason for suggesting that the appellant, and other members of the respondent society, are subjected to unreasonable conditions by an obligation to sell milk at a price to be fixed by a committee of their own choice in the interests of the members of the society, and which it should be assumed, in the absence of evidence to the contrary, will be fairly fixed in the common interests of all the parties concerned.

The appellant however was undoubtedly entitled to argue that, if the restraint as to the selling of his milk was not in itself unduly restrictive, yet it might become so, if considered in connection with the rule which imposed a penalty and with the rules relating to the withdrawal of members from their membership. It may be well to quote a passage from the statement of claim. "The effect of the new rules is that the plaintiff and the other members of the society are for the whole period of their lives bound under penalty

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not to sell the milk of their farms to any creamery or to any other person who sells milk or manufactures butter for sale other than the defendant society." What is the effect of the rule or rules on which this allegation is based? It may be convenient to consider in the first place what is contained or implied in the words "bound under penalty." In form the same penalty or liquidated damages are imposed against the respondent society under rule 6 (1.) as are imposed in their favour under rule 6 (2.). There is however a further provision (rule 6, proviso (*a*)), that instead of proceeding for damages the committee may refuse to purchase milk of any member who shall commit a breach of the terms of Clause 2 of the rule, and it does not follow that the committee might not have adopted this form of alternative remedy in the case of the appellant, or any other complainant member. There is a further difficulty in considering the effect of the provisions in rule 6 (1.) and (2.), which purport to fix an amount in the nature of liquidated damages and not by way of penalty. There has been no attempt to enforce the payment of the amount fixed as liquidated damages and there is little relevant evidence on which to found an opinion whether the provisions in question are not really in the nature of the imposition of penalties. I can only say that as at present advised I should hesitate to say that the so-called liquidated damages could be recovered from the appellant, or that the amount thereof has been estimated with any reference to a calculation of the actual damages that might probably accrue from the breach of the covenant. In other words, it appears to me that the respondent society could only recover against the appellant such actual damage as they could prove, and this view is supported by the argument on behalf of the appellant that if the amount fixed as liquidated damages could be recovered it would be in itself unreasonable, and would inflict harsh conditions on the appellant. It is not however possible to follow this question further in the present appeal. I think it is to be deprecated that action should have been taken on the assumption that the committee of a co-operative society, formed by, and representing the members, would

necessarily have attempted to press their claim to the uttermost, to the disadvantage of the appellant. There is no reason why the respondent society should not have preferred the alternative remedy of rule 6, proviso (*a*), which would not have involved the claim for any damage to the disadvantage of the appellant. I have come therefore to the conclusion that rule 6 taken in its entirety does not impose or imply an unreasonable degree of restraint.

The first provision in the rules relating to membership is to be found in rule 5. "No person carrying on any business similar to that in which the society is engaged shall be eligible to become or continue as a member of the society." The effect of this rule is that if the appellant or any other member carries on any business similar to that in which the society is engaged he becomes ineligible to continue as a member and, ceasing to be a member, he would no longer be liable to the restraints imposed in rule 6 (2.). It was said however that the appellant had no desire to carry on a business similar to that of the respondent society, but only to sell his milk at advantageous terms to a different purchaser, and that this was the restraint of which he was really making complaint. Assuming this to be so, the allegation made in the statement of claim that the restriction is for the whole period of the life of the appellant appears to me to be expressed in far too general terms. It is open for the appellant or any other member, either in partnership or other wise, to set up a business similar to that of the respondent society, in which event his membership comes to an end and the restriction ceases to be operative. The further rules which regulate the continuance of the membership in the respondent society are rules 16 and 21. Rule 16 provides that any member all of whose shares have been transferred or cancelled shall thereupon cease to be a member of the society, but that no member shall otherwise be entitled to withdraw from the society. This brings your Lordships to the consideration of rule 21. Under rule 21 the consent of the committee of management is required for the transfer of shares. The committee have an absolute

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discretion so long as they act bona fide, and they are not bound to assign any reason for refusing to sanction the transfer of shares, and, apart from transfer, no share is withdrawable. The effect is to place the transfer of shares within the power of the committee, and it is of this power that the appellant complains, since the committee by refusing consent to a transfer of shares can prevent a member from withdrawing from the society, thereby imposing upon him, for a duration only limited by their discretion, the obligations which attach to rule 6 (2.). There is, however, positive evidence that whenever a person has applied for a transfer it has been granted (question 745), and moreover the committee of management cannot be regarded as exercising an authority independent of the control of the appellant, and other members of the respondent society. The true position is that each co-operator, in a common interest, has submitted to a discretionary power, which it may be assumed would be exercised impartially in his interest, and in that of all the other co-operators, To take the analogy of partnership there is no doubt that a partner during the duration of a partnership may bind himself not to compete with his firm: *Leather Cloth Co.* v. *Lorsont.* (1) The question in this appeal is in truth one of degree and not of principle. The question is of wide importance since similar rules are said to apply to a large number of co-operative creameries in Ireland. Apart from the considerations which I have addressed to your Lordships and which depend on the construction of the rules, and the conditions to which they are applied, there is some relevant oral evidence which might assist in the determination, whether the impugned restrictions are unreasonable or more than are required for the protection of either or both parties to the covenant. Evidence of what persons in the trade might think to be reasonable or unreasonable is not admissible, this being the very question which the Court is called upon to decide: *Haynes* v. *Doman.* (2)

Assuming that a case has been made out by the appellant which requires an answer, the evidence of Mr. John Byrne,

(1) L. R. 9 Eq. 345, 353. (2) [1899] 2 Ch. 13.

the secretary and manager of the respondent society, and of Charles Coates Riddall, the organizer of the Irish Agricultural Society, supports the plea of the respondent society that the restrictions are no more than sufficient to reasonably protect the interests of that society. Mr. Byrne frankly admits that up to a certain time the less stringent old rules were sufficient to protect the respondent society, but, apparently in connection with the erection of a new creamery, the committee of management became indebted to the bank for a sum of about 1500*l*. The construction of a new creamery has been the subject of criticism, but it is a matter of internal concern dependent on a question of business expediency, and there is no suggestion of improper motive. If therefore the erection of the new creamery, or the general financial conditions of the respondent society, did necessitate some more stringent rule to give security for capital outlay, there is certainly some justification for the alteration of the rules to which objection is taken, and Mr. Byrne in terms states that the object of the rule was to protect the society in a new outlay of capital. I am not prepared to say that this view is erroneous or that the rule has not been shown to be reasonable, whether regarded as one for the benefit of the society, or for the benefit of the members of the society, in order that the members may be kept together, and the society made as strong as possible on the side of financial stability. Mr. Riddall, who has had a large experience of the management of co-operative societies, and is the organizer of the society, which is designated the pioneer of the co-operative farming business in Ireland, states that it is of the very essence of a co-operative society that it should be ensured in its trade and that its members should be bound to deal with it, and that every member gets the benefit of what is done for the good of the society, since anything that benefits the society benefits also its members. He thus draws the distinction between a sale of produce by a member to a co-operative society and the sale of such produce to an outside purchaser, whose primary object is profit on its own account.

In the case of *Tipperary Co-operative Creamery Society*

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v. *Hanley* (1) the Court of Appeal in Ireland gave a judgment in support of conclusions differing from those stated above. The rules were very similar to those under debate in the present appeal, although some weight was attached to the want of any limitation whatever as to the locality of the lands in which the cows might be found, whether in the county of Tipperary itself, or in any other county of Ireland. The arguments however addressed to the Court were similar to those which the counsel for the appellant addressed to your Lordships, and the rules contained a similar penalty clause and did not provide for the voluntary withdrawal of a member except by transfer of his shares to which the consent of the committee was necessary. The Court applied the recognized tests and the judgment of the Lord Chancellor reproduces a passage from Farwell L.J.'s judgment in *Russell* v. *Amalgamated Society of Carpenters and Joiners.*(2) It appears to me that this judgment gives no weight to the distinctive conditions which connote the relationship between a co-operative society and its members. The point is clearly put by Holmes L.J. (3) " The Court has been asked by counsel for the society how does the contract here differ from a similar contract by a person, whose business is to produce a particular article or class of goods, entered into with a wholesale distributor. I answer that there is no substantial difference, and that neither contract could be enforced. Let me suppose that in the days of hand-looms a weaver, who had no other means of livelihood, had contracted with a merchant in Leeds that he would sell to him the output of his loom during his whole life at a price to be fixed by the merchant, would any lawyer argue that such a contract was legal ? It is because the contract arising from rule 5*a* is of the same character that I hold it void." My Lords, with all respect to the opinion of the Lord Justice, I think, for the reasons already stated, that the relationship between a co-operative society and its members is similar not to the relationship between a producer and an ordinary wholesale purchaser,

(1) [1912] 2 I. R. 586. (2) [1910] 1 K. B. 506.
(3) [1912] 2 I. R. 600.

but to the relationship of a partner to his partnership firm, and that it is a fallacy to regard the impugned restrictions as though they had been imposed upon the vendor at the instance of an outside wholesale merchant, purchasing solely for his own benefit.

My Lords, in my opinion the appeal should be dismissed with costs.

Order of the Court of Appeal in Ireland reversed, and order of Barton J. restored. Declared that rule 6 (2.) was illegal as in restraint of trade and ultra vires the society, and an injunction issued restraining the respondents from acting upon or putting in force the said rule against the appellant. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House.

Lords' Journals, March 24, 1919.

Solicitors for the appellant: *E. H. Coopman, for E. B. Slattery, Dublin.*

Solicitors for the respondents: *J. H. MacDonnell, for J. D. O'Connell, Dublin.*

[HOUSE OF LORDS.]

H. L. (E.)* WEINBERGER . . . . . APPELLANT;

1919

April 7. AND

INGLIS AND OTHERS . . . . . RESPONDENTS.

Stock Exchange—Member—Re-election—Naturalized British Subject—Objection of Enemy Birth—Discretion of Committee.

The proprietors of the Stock Exchange are a voluntary association regulated by a deed of settlement, and the members are the persons from time to time admitted to attend, and in their own right to transact business at, the Stock Exchange in accordance with the deed. The deed of settlement vested the building in trustees and managers, to be used as a market for stocks and shares, and provided that a Committee for general purposes should be annually elected by the members, and that the Committee should admit such persons as they should "think proper" to frequent the Stock Exchange for transacting therein the business of a stockbroker or jobber for the term of one year, on payment of the entrance fee (if any) and annual subscription fixed by the trustees and managers; and it empowered the Committee to make rules not inconsistent with the provisions of the deed respecting (inter alia) the admission, expulsion and suspension of members. By rule 21 (1) of the Rules of the Stock Exchange made under this power, "the committee shall on the first Monday in March proceed to re-elect such members . . . . as they shall deem eligible to be members of the Stock Exchange, for one year, commencing on the 25th of March then instant."

In March, 1917, the plaintiff, a naturalized British subject of German birth, who had been a member of the Stock Exchange since 1895, applied for re-election. Certain members, who had formed an organization called The Stock Exchange Anti-German Union, lodged an objection under rule 35 against the re-election of the plaintiff, on the ground of enemy birth. At the invitation of the Committee the plaintiff showed cause against the objection by letter and at an interview, and he stated numerous facts in proof of his loyalty with a view to displacing the objection. The Committee, however, refused his application. Of 107 members of enemy birth 50 were re-elected and 57 were rejected. The plaintiff brought an action to impugn the decision of the Committee on the ground that it was arbitrary and capricious and based on irrelevant considerations. The Committee by their defence alleged that they did not re-elect the plaintiff because they did not deem him eligible to be a member of the Stock Exchange for the year in question and for no other reason:—

Held, assuming that the Committee owed any duty to the members as regards re-election, that the proper inference from the facts was that the

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* *Present:* LORD BIRKENHEAD L.C., LORD BUCKMASTER, LORD ATKINSON, LORD PARMOOR, and LORD WRENBURY.

refusal of the Committee had proceeded solely on the ground of enemy birth, as to which the plaintiff had been heard; that they had bona fide exercised the discretion conferred upon them by the deed of settlement and the rules, and were not shown to have acted arbitrarily or capriciously; and that therefore the Court had no jurisdiction to interfere with their decision.

Order of the Court of Appeal [1918] 1 Ch. 517 affirmed.

APPEAL from a decision of the Court of Appeal affirming a decision of Astbury J. (1)

The question for decision was whether the Committee of the Stock Exchange in refusing to re-elect to the Stock Exchange the appellant, a naturalized British subject who had been a member for twenty-two years, and against whom no objection was or could be taken except that he was born in Germany, acted in the bona fide exercise of the discretion vested in them under the constitution of the Stock Exchange.

The facts are fully stated and the material provisions of the Deed of Settlement of the Stock Exchange and of the rules of the Stock Exchange are set out in the report of the case in 1918 1 Ch. and need not be repeated.

Astbury J. was of opinion that the Committee in refusing to re-elect the appellant had acted honestly and within their discretion, and he therefore held that he had no jurisdiction to interfere with their decision, and the Court of Appeal (Swinfen Eady L.J., Bankes L.J. and Eve J.) took the same view.

1919. March 18, 20, 21. *Gore-Browne K.C.* (with him *Alexander Neilson*) for the appellant. The substantial question for decision is whether the Committee of the Stock Exchange in refusing the appellant's application for re-election have acted in the bona fide exercise of any discretion vested in them under the constitution of the Stock Exchange. No objection is taken to the appellant's loyalty or integrity, and the only possible objection to him is his enemy birth. That is a matter which is foreign to the question of the appellant's eligibility to be a member of the Stock Exchange. The appellant's case depends upon the following propositions of law.

(1) [1918] 1 Ch. 517.

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1. A select body to whom the performance of a duty is delegated, when given power to exercise a discretion, must exercise that discretion without taking into account any matters which are irrelevant to the subject-matters in respect of which the duty is imposed upon them, and if they take into account such irrelevant matters the Court will hold that they have not exercised their discretion, and will give consequential relief. 2. If in the purported exercise of their discretion they have acted arbitrarily or capriciously the Court will set aside their decision. 3. They are not bound in the first instance to state the grounds of their decision, but the complainant may give evidence to show that they have acted arbitrarily or capriciously, and if a prima facie case is made out by the complainant and remains uncontradicted the Court will act upon that evidence. [In support of these propositions he cited *Rex* v. *Board of Education* (1); *Wood* v. *Woad* (2); *In re Wilkes's Charity* (3); *Ex parte Penney* (4); *In re Coalport China Co.* (5); *In re Bell Brothers* (6); *In re Bede Steam Shipping Co.* (7) He also referred to *Cassel* v. *Inglis.* (8)] Applying these principles to the facts of the case the Committee of the Stock Exchange are a body to whom is delegated the duty of electing members. It is their duty to take into account only matters relevant to the fitness of the candidate to be a member of the Stock Exchange. On this occasion they took into account a matter which was irrelevant to that issue—namely, the fact that the candidate had been born in Germany—and they acted arbitrarily and capriciously in that, while rejecting this member, who sought re-election, on the sole ground of the place of his birth, they re-elected a number of members who were in a similar position. It is impossible to discover any ground of distinction between those foreign-born members who were re-elected and those who were rejected, nor was the appellant able to ascertain from the Committee what considerations would outweigh with them the

(1) [1910] 2 K. B. 165, 178-9 (affirmed sub nom. *Board of Education* v. *Rice* [1911] A. C. 179).
(2) (1874) L. R. 9 Ex. 190, 196.
(3) (1851) 3 Mac. & G. 440.
(4) (1872) L. R. 8 Ch. 446.
(5) [1895] 2 Ch. 404.
(6) (1891) 65 L. T. 245.
(7) [1917] 1 Ch. 123.
(8) [1916] 2 Ch. 211.

objection of enemy birth. In all the circumstances of the case the appellant has established that the Committee in rejecting him have allowed themselves to be influenced by extraneous considerations which they were not entitled to take into account under the discretion vested in them by the constitution of the Stock Exchange. As there has been here a misuse of the powers of the Committee their decision ought not to be allowed to stand, but the matter should be remitted to the Committee with a declaration that the appellant's case had not been properly considered.

Upjohn K.C. (with him *Hon. Frank Russell K.C.* and *Douglas Hogg K.C.*) for the respondents. The Committee are the agents of the proprietors of the building called the Stock Exchange to grant licences to persons to be admitted to the building for carrying on the business of a stockbroker or jobber for the term of one year, which is all that is meant by membership, and the persons so elected are to make the payments incidental to membership to trustees for the proprietors. The Committee, though elected by the members, are the proprietors' representative body ; they must exercise care in the election of members in order that the business of the Stock Exchange may be carried on to the greatest possible advantage, but, so far as the election of members is concerned, their duty is owed not to the members but to the proprietors. This is analogous to the case of a proprietary club where the committee is appointed by the members. The proprietors are masters of the situation and it is open to them under the deed of settlement to increase the moneys payable by the members as the price of their admission to any extent. The sole duty of the Committee in electing persons to receive licences to buy and sell stocks and shares in the Stock Exchange was to secure the selection of those persons whose presence in the Stock Exchange would best conduce to the efficient carrying on of the business of the undertaking in the interest of the proprietors.

[The LORD CHANCELLOR. As at present advised I am not prepared to assent to that argument, but you appear to be taking upon yourself an unnecessary burden. You would, I

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think, be well advised to deal with the question whether the Committee have exercised their discretion bona fide.]

Assuming that the Committee owe a duty in respect of the question of election to the members, the appellant has failed to establish that the Committee have not acted honestly and fairly or have exceeded the discretion conferred upon them. [He was stopped.]

Alexander Neilson added nothing in reply.

Their Lordships took time for consideration.

April 7. LORD BIRKENHEAD L.C.: My Lords, this is an appeal from a judgment of the Court of Appeal delivered upon March 26, 1918, affirming a judgment of Astbury J. delivered on February 6.

Hugo Weinberger, formerly a member of the London Stock Exchange, the appellant in these proceedings, was born at Nuremberg in the State of Bavaria in the year 1866 at a moment when Bavaria was at war with Prussia. He came to England in his 21st year, and at the earliest moment permitted by our law—namely, in 1892—he became a naturalized British subject, taking the oath of allegiance on April 1 in that year. In 1894 he became a clerk on the London Stock Exchange, and a year later was elected a member. He paid an entrance fee of 500 guineas and for 21 years paid an annual subscription of 30 guineas. At various times between the years 1904 and 1911 he acquired shares in the Exchange to the aggregate value of more than 4000*l*. These financial undertakings do not for the purposes of this appeal affect the character of the contract into which he entered, but they are part of the history of the case and I think it desirable to set them forth. His firm consisted of four partners, himself, the two Seligmans who were American citizens, and Pearson who was a British subject. Every member of the London Stock Exchange must under the rules be re-elected every March. The appellant was so re-elected without question or criticism from 1895 to 1916. In 1896 he married an Englishwoman born in England of German origin. By her he had two sons and two daughters. At the relevant dates the sons were schoolboys and each was

a member of the Officers' Training Corps at his respective school. His wife and his two daughters have been engaged in patriotic work since the outbreak of war. His wife had four brothers of whom all four have served as combatants in the war. One was wounded and lost his eye. One was killed after specially gallant service. One was invalided but returned to combatant service. All had a German name which they Anglicized. They were enabled to volunteer at an early stage of the war by the financial and other assistance given them by the appellant. No charge has ever been brought to his notice, except that he was born in Bavaria—a constituent State of an Empire at war with Great Britain—and Mr. Upjohn, who cross-examined him at length in the Court of first instance, made no suggestion to him of disloyalty in word or thought to the country of his adoption And it may be finally added that he instructed his counsel to make no reflection upon the bona fides of the gentlemen who at the relevant period were members of the Committee of the London Stock Exchange. The question which requires your Lordships' decision is whether or not the Committee of this Exchange were entitled under its constitution and the powers which they derived from that constitution to refuse at the relevant period to re-elect the appellant as a member. In order to answer that question it is necessary to examine the Deed of Settlement of the Stock Exchange and the rules and regulations which have been sanctioned in order to give effect to its purpose.

The Deed of Settlement of the Stock Exchange of December, 1875, is the constitution under which it works. It is an indenture between trustees and "proprietors" under which arrangements are made for the use of members of certain premises which the proprietors had acquired for the purpose of carrying on Stock Exchange business. Under Clause 94 of the Deed of Settlement it is laid down by the owners of the undertaking that the Committee, which is elected by the members, as distinct from the proprietors or shareholders, shall admit such persons as they shall think proper to frequent the Stock Exchange for the term of one year commencing on March 25 in each year, on payment of the entrance fee, if any,

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and subscription payable to the trustees and managers of the undertaking, and by Clause 95, a clause of some importance, it is provided that the Committee shall regulate the transaction of business by the members and their good order and government, and make rules for that purpose, not inconsistent with the provisions of the Deed of Settlement. Having regard to the view which I individually have formed of the issues which require decision to-day I do not think it necessary to examine more closely the constitution of the Stock Exchange. I should certainly not be content with so perfunctory a treatment if the larger question which Mr. Upjohn indicated as contingently relevant had appeared to your Lordships to be ripe for decision.

After this necessary diversion I complete the history of the facts. From the outbreak of war until January 4, 1915, the Stock Exchange was closed; it was reopened on that date with the consent of the Treasury and under certain restrictions. Amongst them was the following: Regulation 2 provided that the following persons only should be admitted to ownership: (1.) British-born members or clerks, and (2.) Naturalized members or clerks who had re-exhibited their letters of naturalization to the Committee, and, in the case of naturalized members or clerks of enemy origin, who had satisfied the Committee that they had been denationalized in their country of origin. Regulation 9 provided that no securities should be a good delivery unless supported by a declaration by a banker, broker, or other responsible party, that they had remained in their physical possession in the United Kingdom since September 30. Regulation 12 provided that a broker before completing any selling order must obtain a declaration in writing from his client, and must fully satisfy himself that such selling order is not on behalf of or for the benefit of alien enemies, either directly or indirectly.

In May, 1915, the following letter was addressed by the Secretary of the Committee to the members of the Stock Exchange: "May 8, 1915. Dear Sir,—Feeling in the Stock Exchange to-day has run so high that members of German or Austrian birth are advised to keep away from the House at

present. Members employing clerks of German or Austrian birth are requested to convey this intimation to them." Thereafter the appellant did not on any occasion visit the premises of the London Stock Exchange.

In 1915 an Anti-German Union was formed among the members of the Stock Exchange, and the committee of this body thereafter continued to press upon the Committee of the Stock Exchange the adoption of a strong policy in relation to enemy-born members. The detailed history of what took place in 1915 and 1916 is not perhaps important. It is sufficient to say that the anti-German element continued to press upon the Committee by petition and otherwise that enemy-born members should not be re-elected. But on January 5, 1916, the Committee, which has power, as we have seen, under the Deed of Settlement to make and alter rules for the regulation of business, passed a rule that no candidate of German, Austrian, or Hungarian birth should be eligible for election to the Exchange. On January 25 in the same year the then Committee expressed themselves with regard to the question of re-election of members of enemy birth as follows: "The Committee are fully alive to the possibility that there may be naturalized members of enemy birth whose membership of the Stock Exchange is undesirable. Quite apart, however, from legal difficulties they are not prepared to deal with the naturalized German and Austrian members as a body on the lines laid down in the petition. In their petition the memorialists recognize the fact that there are cases in which the refusal to re-elect would be neither desirable nor fair, and that they wish exceptions to be made in such cases. They, however, throw the onus of selection on the Committee, who are called upon to accept sole responsibility. The Committee wish to point out that they are in no better position than the rest of the House for discriminating between members unless an objection to any individual member is submitted to them."

In March of the same year a meeting took place on the Stock Exchange, at which the following resolution was proposed and carried: "That this meeting agrees to oppose the re-election of all persons of alien enemy birth who were

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elected subsequent to March, 1895, with the exception of those who are serving, or have sons serving, in the Imperial Forces." For that resolution 408 Members voted, 41 voted against it, and 36 of those present did not vote. This resolution having been communicated to the Committee, it replied on March 10 as follows: "The Committee think it right to give you and the House the earliest possible intimation that they are not prepared to act on the resolution or to refuse re-election to naturalized members solely on the ground of the country of their birth. This letter discloses a policy from which the Committee are unwilling to depart, and they are not prepared to consider the general notice of objection based on an arbitrary date as a sufficient objection under rule 35. Apart altogether from a personal legal liability to themselves, which may or may not be remote, the Committee are not prepared to submit the House to a dislocation of business and certain of its members to individual hardship which the adoption of the policy advocated at the meeting would entail." In the election of members held in the same month 16 members of enemy birth were originally refused re-election, but 11 of them were subsequently re-elected on reconsideration, leaving 5 only who failed to secure re-election. In January, 1917, the Committee altered rule 10 by excluding from the necessity for confirmation a decision of the Committee dealing with the re-election of members.

In February, 1917, the Committee laid down for itself a system of procedure which it proposed to adopt in the following month with regard to applications for re-election from members of enemy birth. This procedure provided, first, that all applicants objected to on the ground of their enemy birth, origin, or connection should be put on a separate list, that on the receipt of their application the Secretary should issue to each applicant a notice of the objection made to him under rule 35, and that the applicants should be told that they could send for the information of the Committee a written statement of all the facts which they desired to bring to its notice. It was then laid down that each case should be considered separately, and that the attendance before the Committee of the various

applicants should be asked, and that at such interviews no question asked by the candidate with a view to eliciting grounds of objection other than those disclosed or known to him should be answered. And finally it was provided that no reason for any decision should be stated to the applicant or recorded, but simply the result of the voting. The plaintiff sent in the usual application for re-election and was informed by a letter that a notice of objection under rule 35 had been lodged with the Committee on the ground of enemy birth. He was asked to send for the information of the Committee a written statement of all facts which he desired to bring to the notice of the Committee. In answer to this the plaintiff wrote to the Committee a letter containing most of the facts to which I have already referred. Subsequently the Committee interviewed the appellant. I do not think it necessary to recall what took place, because I am satisfied, both from the procedure prescribed by the Committee, and from the evidence, that in fact the only matter considered by the Committee was first whether the appellant was enemy born, and secondly whether he was able to establish any such extraordinary circumstances in his case as would remove him from a general rule which in normal cases I think they had made up their minds to apply. He was offered, both by letter and when he appealed before the Committee, every opportunity of putting forward such circumstances. The Committee had before them more than 100 cases. They apparently voted in each case. The votes varied in almost every case. It is, I think, plain that each case received some reasonable degree of individual attention. If the time consumed on an individual case was sometimes short, the explanation may well have been, as I think it was in the present case, that the particular member took very little time in setting out the facts in his own case which he thought specially favourable to himself. Out of 107 members of enemy birth 50 were re-elected, 57 were not. The appellant was among the rejected.

The question, therefore, which requires decision is this: On the above facts, were the Committee entitled under rule 21 (1.) to deem the appellant ineligible to be a

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member of the Stock Exchange? Mr. Upjohn indeed invited your Lordships to embark upon an inquiry at once more difficult and infinitely more serious. His contention was that the duty of the Committee of the Stock Exchange was to the proprietors, and that they had no duty to the individual member, except that of providing him with the facilities afforded by membership of the Stock Exchange for a period of twelve months. Your Lordships did not invite Mr. Upjohn to pursue this contention, and not having heard this argument I naturally decide nothing upon it. But I beg most expressly to guard myself against the supposition that I accept the view that the member's rights against the Committee were so limited. Had the inquiry been pursued, I should have thought it necessary to consider whether the member had not in addition contracted with the Committee to purchase the expectation that he would in due course be re-elected, unless the Committee concluded in good faith and after considering the matter properly, that he was not eligible for re-election. But my decision is confined to the much simpler issue indicated above. Mr. Gore-Browne admits that if the sole question which was considered was enemy birth, the appellant had a fair hearing. I am satisfied that this was the sole question, though the decision of the Committee was no doubt influenced by the special case on individual merits made by each member in answer to the question whether he wished to call attention to any exceptional fact in his case. I may add that if I took the view that the appellant was condemned upon grounds never brought to his notice, I should not assent to the legality of this course, unless compelled by authority.

Mr. Gore-Browne contends that the Committee, in reaching their view, were influenced by extraneous considerations. I am unable to accept that view. They had to ask themselves this question, and this question only: "Whom do we deem eligible to be members of the Stock Exchange for the coming year?" Put in another (and I think a better) way, the question might be expressed thus: "Who, in our opinion, ought to be re-elected with due regard to the interests of the Stock Exchange and the community as a whole?" It will

be remembered that in answering this question they were not limited to (though they were entitled to pray in aid) their own knowledge and experience as British citizens, but they were aware of and bound by the policy of the Treasury restrictions already set out. The Committee formed their opinion. It is conceded that they formed it honestly. They formed it in my opinion upon grounds which were made known to the appellant and which he had a chance of answering. The short answer, therefore, to the appellant's case is that the Committee did not deem him eligible to be a member of the Stock Exchange, and that neither their good faith nor their mode of procedure has been successfully impugned. No doubt the distinguishing circumstances in the various cases were sometimes very slight, so that a member elected appeared to be almost in the same position as a member not elected, but the Committee thought there was a real distinction. They thought so honestly. And such nice discriminations can only be made by Committees. It is for this very reason that discretion is given to Committees. How can your Lordships or any court of justice examine 100 cases ?

I have set out the facts relied upon by the appellant, for I have little doubt that he has suffered much in every way by reason of the decision, and I think that he is entitled to have them plainly published. It may even be that in a calmer atmosphere the Committee, which, at a grave moment, was disinclined (and I do not criticize them) to take any risks, may be willing under peace conditions to accept as a satisfactory credential 30 years of British citizenship unimpeached upon the essential point of integrity in the substituted allegiance. But however this may be, I am satisfied that the action of the Committee was warranted by the rules, and that the jurisdiction of the Courts cannot in such a case as this be substituted for that of the Committee.

I think that the Appeal must be dismissed with costs and I move your Lordships accordingly.

LORD BUCKMASTER. My Lords, the appellant is a British subject with full rights of British citizenship and owes no allegi-

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ance to any other Power. These privileges are not his birthright for he was born in Bavaria in 1866 when Bavaria, in union with Austria, was at war with Prussia. He came to this country in 1887 and has remained here ever since, having been naturalized in March, 1892. Nothing has been said in the course of these proceedings to throw any doubt upon his loyalty, and indeed, if evidence were needed, it is strong to place this beyond dispute.

His daughters have helped in the work of the war, his sons, who were too young to serve, were each members of Officers' Training Corps in English public schools, and he has materially assisted his wife's four brothers, two of whom have fallen fighting for us in France; another has lost the sight of one eye; the fourth fought at Gallipoli and was invalided home.

There is nothing to support any idea that he has even the most remote sympathy with Germany—and, indeed, that suggestion has never been made. Nor has anything been said or hinted against his personal integrity and honour.

He has been a member of the London Stock Exchange since January, 1895, and he holds shares in the undertaking which he acquired at the cost of 4100*l*. No complaint has ever been made against his conduct on the Stock Exchange or against that of his firm. But on the annual election of Members in March of 1917, he was not elected by the Committee, and the proceedings out of which this appeal has arisen were instituted by him asking for a declaration that the Committee in thus acting had acted wrongly and also for the necessary consequential relief.

In order to ascertain if this claim can succeed it is necessary to consider the constitution of the Stock Exchange, and the elements and conditions of membership.

The London Stock Exchange is in reality a building vested in certain proprietors and used for the purpose of carrying on a market for stocks and shares. It is not regulated in any way by charter or statute. The management owes no duties to the public and the business is subject to no regulations except those which from time to time the Committee for General Purposes think right to impose on those whom they

choose to admit. The prestige and authority of the institution depend entirely upon the reputation it has established for honest and efficient business methods. Any group of people who so desired could start another Stock Exchange to-morrow. It is not a public market — it is a private market and access to it is only obtained through membership.

The relevant clauses in the Deed of Settlement dated December 31, 1875, by which, with the subsequent modifications and the rules made pursuant thereto, the constitution, control and government of the Stock Exchange are now regulated, have already been referred to. It is sufficient to say that they provide that no person shall be permitted to enter or attend the Stock Exchange or to transact business therein, except such persons as have been admitted members by the Committee for General Purposes.

The Committee for General Purposes is established as a Committee of 30 members holding office for twelve months from March 25 in each year, and balloted for by the members themselves on March 10 in every year. In this Committee there is vested the power to admit such persons, whether proprietors or not, as they think proper, and their clerks, to attend the buildings and transact business therein, for the term of one year from March 25, and the Committee have power to make such rules as they think fit not inconsistent with the Deed of Settlement for the good order and government of the members.

The rules that have been made under this power are the rules that are known as the rules of the Stock Exchange. Every person who as a member enters the Exchange is bound by such rules, and the outside public, who engage members of the Stock Exchange to transact their business, engage them on the terms that the business will be conducted in accordance therewith.

So far as the admission and election of members are concerned, the relevant rule is rule 21, which repeats the provisions of the Trust Deed and provides that the Committee shall, on the first Monday in March, proceed to re-elect such members and admit

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such candidates as they shall deem eligible as members of the Stock Exchange for one year.

The appellant, having been admitted in 1895, was duly re-elected from year to year under this rule until 1917. So far as his character and record are concerned, there can, I think, be no doubt whatever that his re-election would have continued without interruption if war had not broken out between this country and Germany. That fact changed the whole situation. Although, at first, praiseworthy efforts were made to avoid involving innocent people in the odium of the war, yet as time went by these efforts became more and more difficult, and the storm of wrath that shook this country after the torpedoing of the *Lusitania* on May 7, 1915, swept away nice feelings of discrimination. Following on this, the Committee, realizing the unseemly scene that might occur if members of German or Austrian birth entered the building, issued a notice advising such members, although naturalized, to refrain from entering the House, and this request was loyally obeyed by the appellant.

On November 10, 1915, 315 members signed a petition to the Committee urging them to inform members of alien birth that they might not be re-elected members of the Stock Exchange. The Committee's reply, written by the Secretary, on January 26, pointed out that they were not prepared to deal generally with the naturalized Austrian and German members on the lines laid down.

The expression and temper of this reply leaves nothing to be desired. It is exactly what might be expected from a body of English gentlemen, anxious at once to maintain the national interest and to avoid injustice.

On March 9, 1916, a further resolution was forwarded to the Committee in which 408 members voted for the exclusion of all persons of alien enemy birth elected subsequent to March, 1895, with the exception of those who were serving or had sons serving with the Imperial forces: 41 members voted against this resolution and 36 did not vote at all. To this the Secretary of the Committee again replied refusing to act on general grounds such as those suggested, and pointing to the

individual hardship which the adoption of such a policy would entail. On November 8, 1916, representatives of the Anti-German Union met the Committee, and again urged their views, and were informed that the matter would be carefully considered. They accordingly furnished the appellant and others with notice of the objection made and laid down rules to govern the consideration of each case.

At the meeting that took place in 1917 the Committee proceeded to consider one by one the cases of the members of the Stock Exchange of alien enemy birth, and in the end refused the re-election of the appellant.

The honesty of the action is not challenged. The Committee acted bona fide in what they believed to be the discharge of their duties, and that is to my mind the complete and sufficient answer to the whole appeal.

It has been urged that their action was capricious and arbitrary, since it is impossible to analyze reasons why some people were re-elected and some refused. The Committee are not bound to assign any such reason, nor is it possible to speculate as to what their reasons may have been.

It is, however, I think fair both to the appellant and to the Committee of the Stock Exchange to say that the course they took did not throw doubt upon his character or his integrity, and that it is obvious the Committee recognized the hardship that would ensue from their action. Of the wisdom, justice, and liberality of the decision, this House is no judge, for no circumstances have been disclosed that would entitle the Courts to interfere with the honest exercise of such a discretion as that vested in the respondents in the present case.

In these circumstances, it is neither necessary nor wise to speculate as to whether there would have been reasons upon which the respondents acted over and beyond the reasons associated with the misfortune of the appellant's birthplace. From that reproach, for which he was not responsible, his record was not able to afford him protection, and he has been deprived of the means of following his profession built up by 22 years' work, but the responsibility for this result rests entirely on the Committee and that responsibility this House can neither assume nor share.

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LORD ATKINSON. My Lords, I concur. The main facts have already been stated.

The appellant in this case was by the appointed body, the Committee for General Purposes of the Stock Exchange undertaking, elected a member of the Stock Exchange in January, 1895. He was re-elected by this Committee in each succeeding year from the year commencing March 25, 1895, up to that commencing March 25, 1917, when, an objection having been made, in the prescribed form, to his re-election, to the effect that he was of alien enemy birth, he was not re-elected. On the occasion of his first election he paid an entrance fee of 500*l.*, and has since paid each year up to March, 1917, the annual subscription payable by all members. These monies are paid to and received by the Committee as the agents or servants of the trustees and managers of the undertaking, and were, by the Committee, paid over to these latter. The right or privilege which a person acquires by the payment of an entrance fee, and the yearly subscription and subsequent election as a member, is simply the right to be admitted to the Stock Exchange building, or any particular and specified part of it, to transact the business of a broker and jobber or of either of them therein for the year, "from March 25 then instant or last preceding the admission of such member." He simply gets a licence to enter the buildings of the trustees and managers of the Stock Exchange undertaking, or any particular and specified part thereof, for and during the year mentioned to transact the business named. That licence terminates with the year named. There is, in my view, no continuity or connection whatever between the membership of a member for one year and his membership for a succeeding year. An existing member has no legal or equitable right or claim to be re-elected for the year succeeding his year of actual membership, though no doubt he may hope or expect that he will be re-elected, but March 25 in each year is a new point of departure at which newly created relations and rights spring into existence. That this is so is forcibly illustrated in the present case by the fact that the appellant, though he had been re-elected for successive years, was

obliged to send in to the Secretary of the Committee an application in writing for his re-election in March, 1917, setting forth particulars, as varied and complete, as could be required, one would suppose, when he first applied for admission. The fact that the rules require this information to be refurnished on each occasion when re-election is sought emphasizes the fact that the new membership obtained by re-election is not, in any sense, an accretion of the old, but is an entirely independent and unconnected creation. The nature and extent of the power conferred upon the Committee touching the admission of members, and the mode provided by the authorized rules for its exercise point to the same conclusion. By the 94th Clause of the Deed of Settlement, it is provided that the Committee for General Purposes shall admit such persons, whether proprietors or not, "as they shall think proper" and their clerks to attend or frequent the building called the Stock Exchange, or any particular part specified thereof, for transacting the business of a stockbroker or jobber for the term of one year commencing on March 25, then instant or last preceding the admission of such persons, on payment of the entrance fee (if any) and the annual subscription which, for the time being, shall be paid to the trustees and managers for such admission and subject to such rule. These words "as they shall think proper" are at once the source and measure of the Committee's power in this matter of the admission of members; but the word "proper" must be construed in connection with the duties imposed upon the Committee, and the nature of the interests subjected to their supervision and control.

No distinction is here made between election and re-election. The word "admit" is used to cover each. Members are by the first clause of the deed defined to be persons from time to time "admitted to attend," and it is clear that all the member buys by the payment of his entrance fee and his annual subscription on the occasion of his first election is the right or privilege or licence to enter into and to transact his business on the Stock Exchange, up to March 25 following the date of his admission.

The next clause of the Deed, number 95, empowers the Committee to regulate the transaction of business on the

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Stock Exchange, and to make rules and regulations not inconsistent with the provisions of the deed respecting the mode of conducting the ballot for the election of the Committee, and respecting the admission, expulsion, or suspension of members, the mode and conditions in and subject to which the business of the Stock Exchange shall be transacted, and the conduct of persons transacting the same; and generally for the good order and government of the members of the Stock Exchange, etc.

The discretion given to the Committee by the deed to admit members is absolute. They can admit such persons as they "shall think proper." The rules to be made touching the admission of members must not be inconsistent with this provision, and must therefore not narrow or cut down this wide and absolute discretion. Accordingly, one finds that rule 21 of the rules of 1915 provides that the Committee shall on the first Monday in March proceed to re-elect such members and admit such candidates as they shall deem "eligible" to be members of the Stock Exchange, for one year commencing March 25 then instant. The qualification for old members and for candidates is precisely the same, both must in the view of the Committee be "eligible" to be members.

Since the rules merely prescribe the method and means by which the power of admission conferred by Clause 94 of the Deed is to be exercised, the word "eligible" must receive a meaning consistent with the meaning given to the words "as they shall think proper." The word "eligible" therefore cannot be confined to the mere personal qualities, manners or moral character of the applicant, it must extend to and cover the possible or probable effect of his re-election or admission on the proper conduct of the business of the Stock Exchange. It is the opinion of the Committee on the "eligibility" of the member, old or new, which is the determining factor. If that opinion is honestly formed and acted upon in good faith with the intention of protecting or promoting the interest of the business of the Stock Exchange, their decision cannot be questioned, though it may, in the opinion of a Court of law, be erroneous and such a decision as that Court would not itself

have, in the same circumstances, made. It would appear to me to be quite possible that political or social excitement or suspicion or prejudice, whether just or unjust, affecting a considerable section of the members of the Stock Exchange might render the presence, as members, of some of the most worthy and blameless members of the community a danger or impediment to the proper conduct of the business of the Stock Exchange. And if so that the Committee might legitimately consider and be guided by this circumstance in the exercise of their discretion.

The appellant was also a proprietor within the meaning of the Deed of Settlement, inasmuch as he has been since 1911 the registered holder of twenty shares in the Stock Exchange undertaking. That circumstance does not, I think, affect the question for decision. In the present suit, the appellant claims a declaration in various alternative forms, either that he is entitled to be re-elected, or that he is still a member. He asks for an order that his name should be restored to the list of members of the Stock Exchange, or for a mandatory order directed to the defendants in the suit, the Committee for General Purposes, (the respondents) to re-elect him, or to deal with his application for re-election in accordance with the true meaning and intent of the rules and regulations of the Stock Exchange.

In the argument before your Lordships a great many of the points taken were eliminated and the question for decision was narrowed down to the following. It was contended that the power vested in the Committee to re-elect a member was, to use the words of Rigby L.J. in *In re Coalport China Co.* (1), "a fiduciary power," to be exercised bona fide to protect the interests which those endowed with the power were bound to protect (in the present case the Stock Exchange undertaking). The analogy of directors of public companies refusing to consent to a transfer of shares in their companies was insisted upon, and the following authorities dealing with it were cited, and it was contended, were applicable: *In re Wilkes's Charity* (2); *In re Penney* (3); *In re*

(1) [1895] 2 Ch. 404, 410. (2) 3 Mac. & G. 440.
(3) L. R. 8 Ch. 446.

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Coalport China Co. (1); *In re Bell Brothers* (2); and *In re Bede Steam Shipping Co.* (3) It is, I think, clear that the appellant's case cannot be put higher than this. It may be doubtful whether it can be put so high; but assuming that the Committee in this matter of re-election of a former member of the Stock Exchange stands in a position analogous to that of directors refusing to consent to the assignment by a shareholder of his shares to a transferee, what are the principles established by these last-mentioned authorities? They are, it appears to me, the following: First, that directors refusing to consent to the transfer are not bound to state their reasons for so refusing. Second, that if they do not state their reasons it must, in the absence of all evidence to the contrary, be assumed that they have acted bona fide and honestly for the furtherance, in their belief, of the interests they were bound to protect; and, thirdly, that in order to vitiate the exercise of their powers it must be shown by evidence that their action was arbitrary and capricious.

The pith of the respondents' defence is contained in para. 9. It runs thus:

"9. The first-named defendants acting bona fide and honestly in the exercise of their duty and discretion under rule 21 did not re-elect the plaintiff because they did not deem him eligible to be a member of the Stock Exchange for the year in question and for no other reason."

The burden of disproving these averments rested upon the appellant. Unless he discharged that burden he must, in my opinion, fail. He contends he has produced evidence sufficient to discharge it. I proceed to consider what that evidence is. It is not disputed that the appellant was born in Nuremberg in Bavaria in the year 1866, that he came to England in the year 1887, that he was naturalized here on March 29, 1892, that he married in 1896 a lady who was a British-born subject, but of German extraction, and that before the month of May, 1911, if not earlier, he and his children had lost their German citizenship.

(1) [1895] 2 Ch. 404, 410. (2) 65 L. T. 245.
(3) [1917] 1 Ch. 123.

In or previous to the year 1915, a Committee of members of the Stock Exchange, styling itself the Anti-German Union, was formed. Whether owing to some communication from them, or for other reasons, the Secretary of the Stock Exchange addressed to the appellant and others in a similar position as to their place of birth a letter informing the addressees that the feeling on the Stock Exchange ran so high on that day that members of German and Austrian birth were advised to keep away from the House (i.e., the Stock Exchange) for the then present, and that members having clerks of German or Austrian birth should convey this intimation to them. The appellant did not, in reply to this request, question the existence of the state of feeling that prompted its making. On the contrary, he and they, much to their credit, complied with the request and absented themselves from the Stock Exchange up to the month of March, 1917. The very fact that this request was made and was so treated would tend to show that the Committee had an honest belief in the possibility of some unseemly disorder in, or interruption of, the business of the Stock Exchange resulting from the presence in the House of members of the class mentioned. After the sinking of the *Lusitania* anti-German feeling became more intense, and a petition, bearing the signatures of 318 members of the Stock Exchange, emanating from this Anti-German Committee, was, on November 10, 1915, presented to the Committee for General Purposes. In it warm approval was expressed of the action of the Committee in the previous May in making the request already mentioned, the Committee were assured that what was then desirable had become imperative, it was urged that all German and Austrian members should be at once informed that they might not be re-elected in the following March, and it was suggested that the Committee might make an exception in favour of a member who was known to have sons fighting in the English Army or Navy. On January 26, 1916, the Committee replied to this petition, stating that they were not prepared to deal with naturalized Germans and Austrians in a body on the lines suggested in the petition, calling attention to rule 35, which

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requires one member intending to object to the re-election of another to communicate the grounds of his objection by letter to the Committee previous to the re-election, and, at the same time, informing the petitioners that they (the Committee) were fully prepared to consider and adjudicate upon any objection to the re-election of a member communicated to them according to the aforesaid rule.

The Hon. Gilbert Johnstone, acting apparently on behalf of the aforesaid Union, by letter dated March 9, 1916, communicated to the Committee a resolution passed by 408 members of the Stock Exchange at a meeting at which 485 members were present. The resolution ran as follows: "That this meeting agrees to oppose the re-election of all persons of alien birth elected subsequently to March, 1895, with the exception of those who are serving or have sons serving in the Imperial Forces." The writer further informed the Committee that the grounds of objection of the majority were that the members in question were of alien enemy birth. On the following day the Committee informed Mr. Gilbert Johnstone that they were not prepared to act on the resolution or to refuse re-election to naturalized members solely on the ground of the country of their birth.

On February 7, 1917, this same gentleman addressed to the Committee a letter informing them that he had been instructed by his Committee (i.e., the Anti-German Union) to lodge on their behalf an objection to the re-election of every member of the Stock Exchange of alien enemy birth, as they considered their membership a national danger and contrary to the interests of the Stock Exchange. At a meeting of the Committee held February 12, this last-mentioned letter was considered, and a resolution was passed to the effect that Mr. Gilbert Johnstone be informed that the Committee would require a specific objection under rule 35 to each person—not a general objection. The appellant in due course, as required by the rules, lodged with the Committee the application, in the form prescribed, to be re-elected as a member of the Stock Exchange for the year commencing March 25, 1917. On February 15 the Secretary of the Committee for

General Purposes wrote to the appellant a letter informing him that a notice of objection under rule 35 had (as the fact was) been lodged with the Committee on the ground of his enemy birth, that his application for re-election would receive special consideration on or after March 5, and suggesting that the appellant should, before that date, send to the writer, for the information of the Committee, a written statement of all the facts which he desired to bring to their notice, and informing him that, should the Committee desire to see him, a further notice giving the hour for his attendance should be sent to him.

The appellant having thus had full notice of the nature of the objection made to his re-election, and an ample opportunity given to him of meeting it, availed himself of that opportunity. On February 19, 1917, he wrote to the Secretary of the Committee the letter following :

"Dear Sir,—I have to acknowledge receipt of your letter of the 15th instant, and in reply thereto I wish to state that I came to England in 1887, being then twenty years of age. At the earliest possible date permitted by law, that is to say, five years after I reached this country, I put in an application to be naturalized as a British subject, which application was promptly granted, and was denationalized in Germany, the relative papers were submitted to your Committee in 1915.

"I have been continuously engaged in business in London from the time of my arrival here in 1887. I have not been out of England since the declaration of war, and in fact I have not left this country since 1887 for a longer period than three weeks at any one time. In 1896 I married an English woman, and my family consists of two girls and two boys, the latter aged fifteen and thirteen ; my daughters are unmarried.

"I have always been a loyal British subject both in act and in thought, and I submit that there cannot possibly be any good ground for the objection which you state has been made to my re-election.

"I shall be happy to answer any further questions the Committee may wish to put to me.—Believe me, dear Sir, Yours truly, "(Signed) HUGO WEINBERGER."

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The appellant subsequently received an intimation from the Committee that they desired his attendance before them. On March 8 he attended before them accordingly. In his evidence given at the trial of this case he purports to detail what occurred before the Committee. He said he stated that the Chairman informed him that his letter to the Committee had been read to them and asked him if he wished to add anything further, to which he replied :

" Gentlemen, I can only confirm what is laid down in my letter to you. I came to this country thirty years ago, and as a Clerk and Member of the House have always been employed on Stock Exchange business. We induced or assisted our clerks to join the Forces at the earliest possible moment. My wife is doing voluntary work on the Care Committee of a London County Council School and my eldest daughter is working at the Labour Exchange, my youngest one is in a Military Hospital, and my two boys are still too young to be in the Army. My wife lost one brother in September, 1916, her second brother was severely wounded and lost the use of his right eye ; she has, besides, two more brothers who have commissions in the Army."

On the same day the Secretary of the Stock Exchange wrote to the appellant a letter informing him that his application for re-election for the year commencing on the 25th instant, together with his letter of February 19, had been that day laid before the Committee for General Purposes, and that he had been directed to inform him he had not been re-elected a member of the Stock Exchange.

The appellant appealed against the decision, and on March 12, 1917, the Committee declined to reconsider their decision. During the argument before your Lordships it was again and again repeated by Mr. Gore-Browne that the members of the Anti-German Union, though numbering over 400 and sufficiently powerful to put forward 8 of their number for election on the Committee, 6 of whom were returned, were yet only a fraction of the members of the Stock Exchange.

That no doubt is so. They were, however, a very active and persevering body, and in this communication to the Committee they represented that their views were shared by their fellow-members of the Stock Exchange. It was not proved in evidence, or even suggested, that any meeting of members of the Stock Exchange was ever held to express disapproval of, or condemn the action of the Anti-German Union.

The Committee dealt with the application for re-election of many members whose re-election had been objected to on the same grounds as those relied on in the appellant's case. Most of those so objected to were not re-elected; but several of them, for reasons not disclosed by the Committee, were re-elected.

Mr. Gore-Browne relied upon the refusal to re-elect so many of the members and the re-election of others to whom the same objection applied as evidence that the Committee had used their "fiduciary power" arbitrarily or capriciously. I can understand that argument though I cannot yield to it. One does not know, and cannot discover on what ground the Committee acted; but it is quite conceivable that some special ground may have existed in the case of these re-elected members amply justifying the Committee in honestly making these exceptions with due regard to the furtherance of the interests of the Stock Exchange. I do not think, therefore, that the fact that the exceptions were made is any evidence to show that the Committee, in exercise of their fiduciary power, acted arbitrarily or capriciously. What I cannot follow is the contention in reference to this differential treatment, based upon the authority of *Wood* v. *Woad* (1), that the appellant did not, according to the requirements of natural justice, get notice of the objection made to his re-election and get a full opportunity of defending himself.

He did get notice of the objection, and was offered an opportunity of defending himself.

If any charge be made against a man on the ground that he did some act or filled some character, then before he can be found guilty of that act, or be found to have filled that character, he must, according to natural justice, get notice of the charge,

(1) L. R. 9 Ex. 190.

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and be offered an opportunity of defending himself, but having had that opportunity, if the matter charged be proved, what those in authority may determine to do to him or his interest because of the fact so established is a subject on which he has no right whatever to be heard.

The objection made to the appellant's re-election was that he was of alien enemy birth. He had every opportunity of meeting that, of putting forward everything he considered wise to mention, the condition of his family, his loyalty, good citizenship, etc. I am far from suggesting that every word he spoke was not absolutely true, or that he was not a most worthy and respectable citizen, but that the Committee should inform him of the principle upon which they were about to act, of what danger, if any, to the interests of the business of the Stock Exchange they apprehended from the continuance of his membership, for what reason or upon what ground they were about to re-elect some of the members objected to, and not others, in order apparently that he might have an opportunity of debating these matters with the Committee, and of showing that their action was arbitrary or capricious, or illegal or unjust, is a most unreasonable contention. I purposely abstain from dealing with the question of the alleged hardship inflicted upon the appellant by the action of the Committee. I do so because, however severe or unjust I might consider it, we have no power, upon this appeal, to remedy it. However, we may hope that in the altered circumstances which now exist it will be remedied. It is apart from and foreign to the dry question of law we have to decide, namely, the legal validity of the respondents' act. In my opinion no evidence has been adduced to show that the respondents acted arbitrarily or capriciously and therefore the appeal fails and should be dismissed with costs.

LORD PARMOOR (read by LORD BUCKMASTER). My Lords, the appellant is a British subject naturalized in this country and denationalized in Germany. He was born at Nuremberg in Bavaria in February, 1866, and came to England in 1887. Since that time he has been continuously engaged in business

in London, becoming a member of the Stock Exchange in January, 1895, paying an entrance fee of 500 guineas, and a yearly subscription of 30 guineas. At different dates he purchased 20 shares in the undertaking of the Stock Exchange at a cost of between 4000*l.* and 5000*l.* In 1896 he married an English born wife and has always been a loyal subject both in act and thought. It is not suggested that he has ever acted in any dishonourable manner or not observed in his business conduct the rules, to which he is subject, as a member of the Stock Exchange. Like other British subjects, against whom no charge of misconduct of any kind could be made, he was annually re-elected a member without question until the year 1917.

On February 15, 1917, the appellant received a letter from the Secretary of the Stock Exchange informing him that a notice of objection, under rule 35, had been lodged on the ground of his enemy birth. There was no suggestion of objection on any other ground, but the appellant was asked to send a written statement for the information of the Committee of all facts that he desired to bring to their notice and was informed that his application for re-election would receive special consideration on or after March 5. In answer to this letter the appellant wrote that he had been naturalized as a British subject at the earliest possible date permitted by British law, and was denationalized in Germany. The letter further stated that he had always been a loyal British subject both in act and thought, and that he had not been out of England since the outbreak of war and, as a matter of fact, had not left the country since 1887 for a longer period than three weeks at any one time. The appellant attended the meeting of the Committee of the Stock Exchange on March 8 and an account of this interview is given in the evidence.

" Will you be good enough to tell my Lord what passed at your meeting with the Committee? 'I entered the Committee room, the Chairman asked me to be seated. He then said: " Your letter, Mr. Weinberger, to the Committee has been read to the Committee. Do you wish to add anything further? " '

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"What did you say? 'I said: "Gentlemen, I can only confirm what is laid down in my letter to you. I came to this country thirty years ago, and as a clerk and member of the House have always been employed on Stock Exchange business. We induced or assisted our clerks to join the forces at the earliest possible moment. My wife is doing voluntary work on the Care Committee of a London County Council School and my eldest daughter is working at the Labour Exchange, my youngest one is in a military hospital and my two boys are still too young to be in the Army. My wife lost one brother in September, 1916, her second brother was severely wounded and lost the use of his right eye, she has besides two more brothers who have Commissions in the Army, and unfortunately since my meeting with the Committee, one of them was killed in April, 1917."

"Mr. Justice Astbury: There are four brothers, are there? 'Yes.'

"Mr. Tomlin: One has been killed since your meeting with the Committee? 'Of my wife's four brothers, two have been killed, one has lost his right eye and has been mobilised out of the Army and the fourth is still in France. I further stated: "I have never done anything I need be ashamed of, and there is not the slightest reason that I should forfeit the esteem and respect of my fellow-members." That is the statement which I made to the Committee. The Chairman then said, "Thank you," and I left the room.'

"That was all that passed? 'All that passed.'

"No question was asked? 'Not a single question in any shape or form whatsoever.'"

On the next day the appellant received a notice in writing dated March 8, 1917, from the Secretary of the Stock Exchange informing him he had not been re-elected a member. He thereupon brought an action in which the substantial question raised was as to the right of the respondents to refuse re-election of a British subject to the Stock Exchange, who had been a member of the Stock Exchange for 22 years and against whose integrity, conduct, or loyalty no objection could be or had been taken. In their statement of defence the respondents

pleaded that they acted bona fide and honestly in the exercise of their duty and discretion under rule 21, and that they did not re-elect the appellant because they did not deem him eligible to be a member of the Stock Exchange for the year in question and for no other reason. This allegation is not questioned and the appeal must be determined on this basis.

The first matter to decide is whether the re-election of the appellant was refused solely on the ground of enemy birth, apart from any other consideration. On this subject I agree in the conclusions of Astbury J. and Bankes L.J., and dissent from those of Swinfen Eady L.J. and Eve J. It appears to me that the conclusion that the Committee did not entertain any other consideration than the enemy birth of the appellant is the natural and necessary inference from all the relevant circumstances applicable to the case. Objection to the re-election of the appellant was lodged under rule 35, solely on the ground of enemy birth. There was no other objection of which the Committee had any notice, or to which the attention of the appellant was in any way directed. The evidence given by the appellant and quoted above shows that the inquiry before the Committee was limited to the single issue, and that after the appellant had made his statement in reference to this issue, not a single question was asked in any shape or form whatsoever. I agree further with Bankes L.J. that the procedure of re-election which the Committee laid down for themselves is almost conclusive, that the Committee intended their deliberations to be confined to the particular objection made under rule 35 and to that alone, and that their deliberations were so confined. There was no obligation on the respondents to give any evidence at the trial, and they may have been well advised not to do so, but, in the absence of any such evidence, I am unable to draw an inference which appears to me to be inconsistent with all the documentary evidence, and not reconcilable with the evidence given by the appellant. My Lords, in my opinion, this finding that the consideration of the Committee was limited to a single issue, of which the appellant had notice, and which he had full

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opportunity to answer, is of critical importance in the determination of the appeal.

As at present advised and without hearing further argument, I am not prepared to hold that a body in the position of the Committee of the Stock Exchange have an absolutely autocratic power to act as they please, and without regard to fundamental principles of just inquiry, in exercising a duty which is judicial in this sense, that it necessarily implies consideration and a decision which affects not only the immediate pecuniary interests, but also the whole business status of the member whose re-election is refused. The Committee are not, of course, bound to treat such a question as though it were a trial. They can obtain information in any way they think best. I am, however, not satisfied that they are not subject to the limitation expressed in this House by Lord Loreburn (*Board of Education* v. *Rice* (1)) always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. " In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is the duty lying upon everyone who decides anything." No doubt the decision of this case has reference to a public duty exercised under statutory authority. It was approved as applicable to the decision of an Acting Colonial Governor in the case of *de Verteuil* v. *Knaggs*. (2) I know of no decision in this House which would exempt the Committee of the Stock Exchange from similar obligations to observe the fundamental principles of just action in giving a decision on the ineligibility of a member of the Stock Exchange, but, on my interpretation of the facts, the question does not arise for determination in the present appeal.

The Deed of Settlement of the Stock Exchange vests the hereditaments and premises in the hands of trustees and managers to maintain the building called the Stock Exchange and to employ it for the transaction of buying and selling English and foreign stocks and shares in public and other

(1) [1911] A. C. 179. (2) [1918] A. C. 557.

companies. A Committee for General Purposes is to be elected each year and such Committee shall appoint such persons, whether proprietors or not, as they shall think proper, to attend and frequent the Stock Exchange to transact therein the business of a stockbroker or jobber for the term of one year commencing March 25 on payment of entrance fee (if any) and annual subscription, and subject to such rules and regulations as may from time to time be made by the Committee. There is no doubt that this provision in the deed gives a very wide discretion to the Committee in the admission of members, a discretion which could not be questioned in any court, if honestly given on relevant considerations, and after giving a fair hearing to any person affected. The rule relating to the re-election of members is rule 21, and there are different rules relative to the admission of a candidate for the first time. Rule 21 (1.) provides that the Committee shall, on the first Monday in March, proceed to re-elect such members and admit such candidates as they shall deem eligible to be members of the Stock Exchange for one year, commencing on March 25, then instant. In the present case the Committee, after inquiry and notice to the appellant, deemed him not eligible on the ground of his foreign birth and in exercising their discretion they acted honestly and with bona fides. The only question, therefore, which can be entertained by the House, even if this question is open, is whether this was a relevant consideration on which it was competent for the Committee to act. My Lords, I think that it is impossible to answer this question in the negative and to treat the refusal to re-elect a member on the ground of enemy birth alone as an ultra vires act. Warnings to members of enemy birth to keep away from the House were originally given in May, 1915, and repeated in the following January, and the disregard of this notice by some members resulted in some violence and disorder. It is notorious that different views are held as to the treatment which should be awarded to persons of enemy birth during a period of war, but if the decision which they have given is within the competence of the Committee, and within the limitations to which I have referred above, this appeal cannot succeed.

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My Lords, in my opinion the appeal should be dismissed with costs.

LORD WRENBURY (read by LORD ATKINSON). My Lords, in the year 1917 the plaintiff was and for some 22 years had been a member of the London Stock Exchange. He was a partner in the firm of Seligman Weinberger and Pearson. In March, 1917, at the annual re-election of members the Committee for General Purposes of the Stock Exchange (to whom was entrusted the duty of re-electing such members "as they shall deem eligible to be members of the Stock Exchange") did not re-elect him. The question is whether their decision in the matter is open to review by the Court. To answer this question it is necessary to see what is the constitution of the society and what are the office and the authority of the Committee as defined by the Deed of Settlement of the society and by the regulations made under the authority of the deed.

The undertaking of the London Stock Exchange is a voluntary association of persons styled "proprietors" holding shares in a capital or stock of 240,000*l.* represented by the freehold, leasehold, and other property of the undertaking, divided into 20,000 shares on which 12*l.* per share was in 1875 credited as paid up. The society was originally constituted under a deed of 1802 but in 1875 became and now is governed by a deed of settlement dated December 21, 1875. It owns a building in the City of London known as the Stock Exchange, and shortly stated its business is to employ that building for a market in stocks and securities, to which market it admits such persons (called members) as it thinks fit upon the terms of payment by them of certain substantial sums for entrance fee and annual subscription. It is now, but was not until some time after 1875, the rule that a member must within a limited time after entrance acquire shares and thus become not a member only but a proprietor also. The deed contains no provision to that effect. A subsequent regulation made under the authority of the deed requires a member on his election and before exercising any of the privileges of membership to become a proprietor by acquiring certain shares, and if he

fails to do so within six months his election is to be cancelled. "Proprietors" therefore are holders of shares in the undertaking. "Members" are persons admitted to transact business in the building—and they are respectively so defined in art. 1 of the deed. A "member" is the holder of a licence and nothing more.

The property of the society is vested in persons styled "trustees and managers." The payments made by members are paid to the trustees and managers for the general purposes of the undertaking. There are provisions for accounts and payment of dividends. These go, of course, to the proprietors. The members are not concerned with them. The trustees and managers can under art. 50 (K) of the deed from time to time vary the entrance fee and annual subscription to be paid by members "admitted to attend and transact business at the Stock Exchange," and, subject to rules to be made by the Committee, the trustees and managers are to permit all persons admitted as members by the Committee who have paid the price of admission to attend and transact business. Under art. 54 not even a proprietor can enter, attend or frequent the Stock Exchange unless he has been admitted as a member by the Committee. Under art. 90 of the deed the Committee for General Purposes is a body elected annually in March, not by the proprietors but by the members. By art. 94 it is for the Committee annually to admit such persons, whether proprietors or not, as they shall think proper and their clerks to attend or frequent the building and transact business "for the term of one year." By art. 95 the Committee is to regulate the transaction of business on the Stock Exchange and they may make rules and regulations not inconsistent with the deed respecting (inter alia) "the admission, expulsion or suspension of members." Art. 109 empowers the proprietors to alter, revoke or annul any of the clauses of the deed.

My Lords, the result of all this is that the proprietors as holders of the capital stock of the undertaking of the Stock Exchange employ the building called the Stock Exchange, which is their property, as a market for the transaction of a certain business by persons licensed to enter the building in

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consideration of payment made as the price of being allowed to enter and transact business there. The persons so permitted to enter are such as the Committee for General Purposes shall "think proper." The Committee owes its existence to the will of the proprietors as expressed in the deed. The proprietors—not the members—are its principals and none the less because the proprietors have thought proper to confer upon the members the right to appoint it.

Under the authority given by art. 95 of the deed the Committee have made regulations and amongst them is art. 21 which runs as follows: "The Committee shall on the first Monday in March proceed to re-elect such members and admit such candidates as they shall deem eligible to be members of the Stock Exchange for one year commencing on March 25 then instant." It was under that article that the Committee proceeded when in March, 1917, they decided not to re-elect the plaintiff.

My Lords, the result of these instruments which control the matter with which your Lordships have to do is in my judgment as follows: The proprietors in the matter of the control of their own property have thought proper to confer upon the Committee authority to admit annually to the Stock Exchange for profit, such persons (in the language of art. 94 of the deed) as the Committee "shall think proper" and to re-elect (in the language of rule 21 of the Regulations) such members "as they shall deem eligible." This is a fiduciary power to be exercised honestly and bona fide by the Committee in the interests of the proprietors who are their principals. That is the whole duty which they owe. To call their action in the matter judicial or quasi-judicial is to my mind a misuse of language. It is an administrative power given by a principal to an agent. The member who is standing for re-election is in no sense before a judge who can pronounce judgment against him. The Committee need not formulate or state any charge against him. He is not entitled to notice, in order that he may defend himself. The only question for the Committee is whether they "deem him eligible." If they consider this question fairly their decision in the matter is alone material.

Their whole duty is to their principals, and that duty is honestly and bona fide to use their authority in the interests of their principals.

Under rule 35 a member can object to the re-election of a member. When the Committee meet to consider re-election they may take into consideration and ought to take into consideration anything which they consider material in discharging their duty to their principals and they must take into consideration any objection made under rule 35. If they comply with these requirements they and they alone are the persons to determine whether the member shall be re-elected or not. They are not bound to give their reasons. The plaintiff's counsel did not dispute that. If they take the matter into their consideration and act honestly and bona fide, their decision cannot in my judgment be reviewed in any court. The Court will draw no inference against them because they do not state their reasons. The very purpose of provisions such as these is that the body entrusted with the power shall, while acting honestly, enjoy for the benefit of the society which is their principal the unassailable right to give effect to their own considered judgment and opinion without disclosing their reasons. These principles were stated many years ago in *Ex parte Penney* (1), a decision with which I entirely agree.

Having said this much I come to the facts of this particular case. The plaintiff was born in Germany, he was of enemy alien birth. A number of members of the Stock Exchange had some time before March, 1917, developed an intensely strong feeling against Germans, aggravated in May, 1915, by the sinking of the *Lusitania*, and had associated themselves together in a body called the Anti-German Union. They served under rule 35 a notice of objection to the re-election of the plaintiff and others, assigning as their reason "alien enemy birth, as we consider their presence a national danger and contrary to the interests of the Stock Exchange." That objection was one to which the Committee were bound to give consideration and it was for them to consider what weight they should give it. The appellant says that the fact that he

(1) L. R. 8 Ch. 446.

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was born in Germany 52 years ago is not relevant to anything in the matter. Thus stated this may be true, but that is not the point. The point is not that he was born in Germany, but that the fact that he was born in Germany had brought him under an antipathy so strong in the minds of other members of the Stock Exchange that they resented his being associated with them in business. The Committee were entitled to form and give effect to their judgment upon this matter, and if they thought that in the interest of their principals a person obnoxious to the other members by reason of such an antipathy was not one whom they "deemed to be eligible" they were entitled to act upon it. The Committee further were entitled to take and owed the duty to take into consideration not only that matter but any other matter which in their judgment honestly exercised ought to influence them. What they did take into consideration no one knows. The plaintiff makes no attack on the honesty and bona fides of the Committee. He was offered and availed himself of the opportunity of attending before them and saying what he had to say. The Committee on the other hand have made no attack whatever upon the plaintiff. They have not disputed any of the facts which the plaintiff puts forward as indicative of his complete loyalty to this country. But they say, and in my opinion they are entitled to say, "acting honestly and bona fide we have decided for reasons which we need not disclose, and do not intend to disclose to any one—reasons satisfactory to us—that we do not think proper that the plaintiff should be a member—we do not deem him eligible."

Although the plaintiff's counsel expressly state that they do not attack the honesty and bona fides of the Committee they yet say, not quite consistently, I think, that the Committee acted arbitrarily and capriciously. There were standing for re-election in 1917, 107 persons of enemy alien birth. The Committee re-elected 50 and did not re-elect 57. The plaintiff was one of the 57. "Why," he asks, "did you not re-elect me? You admit all the facts in my favour—my long residence in England—my naturalization—my denationalization—my acts and connections all indicative of loyalty. You were arbitrary

and capricious in rejecting me." To this he adds instances such as that in 1915 and 1916 the Committee re-elected members of enemy alien birth but in 1917 changed their attitude towards that question; that one member was not re-elected who had lost his only son, killed while fighting for this country, and so on. My Lords, instances of this kind seem to me to tell against and not in favour of the plaintiff. They go to show that the Committee did not act lightly or hurriedly in the matter of the bearing of enemy alien birth. In March, 1916, they by letter informed the Anti-German Union that they were not prepared to act solely on the grounds of enemy alien birth, that they recognized the hardship and would consider the re-election of each member. They did give attention to each individual case, and even where a candidate had so strong a claim that he had lost his only son fighting for this country they, for some reason or other, thought it right not to re-elect him although they did re-elect others who in the matter of enemy alien birth stood in the same position as he did. As to the rest of the contention it is in my judgment wrong. The plaintiff cannot ask the reasons, and nothing is to be imputed against the Committee because they do not give them. I see no evidence that the action of the Committee has been in any respect arbitrary or capricious.

It will be convenient, and I hope useful, that I should state what are in my opinion the position and rights of a member—and by that I mean his position and rights as a member only, irrespective of the fact that under the present regulations he must be a proprietor also. By payment of his entrance fee of 500 guineas and his annual subscription he acquires the right of entry to transact business on the Stock Exchange for one year and no more. Even that limited and temporary right is terminable in certain events, e.g., under art. 30, if his wife engages in business or he joins another institution where dealings in stocks or shares are carried on; under art. 39 if he parts with his shares; under art. 161 if he is adjudicated bankrupt; under art. 160 or the temporary regulation art. 178 a. if he is a defaulter or is suspended as a liquidating member. Further, under art. 50 (K) or art. 94 of the deed his annual subscription

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(if he is re-elected) may from time to time be raised and under art. 109 of the deed all or any of the clauses of the deed under which he enjoys such rights as he has may be swept away. On the other hand he enjoys an anticipation—and I have no doubt a very well-founded anticipation—that the Committee (who by authority given by the proprietors are appointed by his own class—by the members) will not only in fair treatment of himself, but in the interest also of the business of the proprietors and of the profitable occupation and user of their premises give all reasonable effect to the consideration that he has paid a substantial sum for a membership which is the basis of his business existence, and that while he has no legal claim he has a business claim to re-election in the absence of good reasons to the contrary. He has a tenure based upon no legal right of continuance, but resting upon sound business considerations which he must be taken to have considered satisfactory when he paid his entrance fee. If he proved that the fiduciary power of the Committee had been abused by acting upon improper motives it may be (I will say a word presently upon the question whether it is) possible that he could in a proper proceeding question their decision, but in the absence of evidence to that effect the decision of the Committee in the matter of re-election is final.

My Lords, in this opinion I have confined myself to the principal and very important question to which your Lordships wished to confine yourselves to the exclusion of the technical question whether this action in its present form can be maintained at all. But from the fact that I have said nothing about it, I would not have it inferred that I am of opinion that it can. I express no opinion that a member as a member can question the decision of the Committee upon any grounds, even the ground of improper motive. It may be that while the Committee owe a duty to the proprietors in the discharge of their fiduciary power they owe none to the member. It does not follow that a member—seeing that he is also a proprietor—could not sue. But if he did it may be that his action would have to be brought on behalf of himself and all other proprietors and that the trustees and managers would be necessary parties

to the action. Upon these questions it is unnecessary to express an opinion.

Dealing with the case exclusively upon the grounds stated in the earlier part of this opinion, I am of opinion that the decision below is right and that the appeal must be dismissed with costs.

In parting with the case it is not for me to express any opinion as to whether the relation into which the plaintiff entered by paying his entrance fee and subscription is one which has resulted in a hardship upon the plaintiff or not. I have only to say what the result is. I may however properly add that I have not found in the materials before the House any personal charge whatever made against him.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 7, 1919.

Solicitors for the appellant: *Herbert Smith, Goss, King & Gregory.*

Solicitors for the respondents: *Travers Smith, Braithwaite & Co.*

[PRIVY COUNCIL.]

J. C.* 1919 Feb. 6.

WIJEYESEKERA . . . . . Appellant;

AND

FESTING . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Acquisition of Land—Public Purpose—Direction of Governor—Finality—Acquisition of Land Ordinance (Ceylon), 1876, ss. 4, 6.

When after the receipt of a report directed to be made under s. 4 of the Acquisition of Land Ordinance (Ceylon), 1876, the Governor, under s. 6, directs the Government Agent to take orders for the acquisition of specified land in Ceylon, it is not open to the owner to contend in any Court that the land is not needed for a public purpose. *Government Agent* v. *Perera* (1903) 7 Ceylon N. L. R. 313 approved.

Appeal from a judgment of the Supreme Court of Ceylon (September 4, 1917) varying the judgment of the District Court of Kalutara.

The appellant was the owner of an estate in the district of Kalutara, Ceylon; the respondent was the Assistant Government Agent for that district.

On September 14, 1915, the Governor of Ceylon directed the respondent, under s. 6 of the Acquisition of Land Ordinance, 1876, to take order for the acquisition, under the provisions of the Ordinance, of part of the appellant's estate for a public purpose—namely, the making of a road.

Upon receipt of the above direction the respondent took the steps prescribed by the Ordinance, but the appellant failed to appear before him to claim compensation. The respondent thereupon proceeded, pursuant to ss. 11 and 13, by libel of reference in the District Court, making the appellant, and two other persons who claimed to be interested, defendants.

The appellant by his answer alleged, inter alia, that the land was not required for any public purpose, and that the direction of the Governor consequently was invalid.

The District Court rejected the plea and assessed the

* *Present*: Lord Finlay, Lord Parmoor, and Lord Wrenbury.

compensation at an amount which had been paid into court.

The Supreme Court, following a previous decision, affirmed the District Court in holding that the direction under s. 6 was conclusive that the land was required for a public purpose, but increased the compensation allowed to the appellant.

1919. Feb. 6. *Sir Erle Richards K.C.* and *Dighton Pollock* for the appellant. The appellant was entitled to challenge the validity of the direction. If he could not do so upon the present proceedings it does not appear that there is any method by which an invalid order can be questioned. The decision of the Supreme Court in *Government Agent* v. *Perera* (1) was erroneous. The decisions in India, such as *Ezra* v. *Secretary of State for India* (2), are not applicable, because the Indian Land Acquisition Acts of 1870 and 1894 expressly provide that the order of the Local Government is to be conclusive. It was held in *Rangoon Botatoung Co.* v. *The Collector, Rangoon* (3) that in proceedings under the Indian Land Acquisition Act, 1894, no appeal lay to the Privy Council as of right. If that decision is applicable to the present appeal the appellant prays for special leave.

Tomlin K.C. and *Giveen* for the respondent were not called upon.

The judgment of their Lordships was delivered by

LORD FINLAY. This appeal raises a short point upon the construction of the Ceylon Ordinance No. 3 of 1876. The two sections which are material in that Ordinance are ss. 4 and 6. Sect. 4 provides: "Whenever it shall appear to the Governor that land in any locality is likely to be needed for any public purpose, it shall be lawful for the Governor to direct the Surveyor-General or other officer generally or specially authorized by the Governor in this behalf, to examine such land and report whether the same is fitted for such purpose."

The section then goes on to confer certain powers upon

(1) 7 Ceylon N. L. R. 313.
(2) (1902) I. L. R. 30 C. 36; (1905) L. R. 32 Ind. Ap. 93.
(3) (1912) L. R. 39 Ind. Ap. 197.

J. C. 1919 WIJEYE-SEKERA v. FESTING.

the Surveyor-General with regard to entering upon the land and doing certain acts upon it. Sect. 6 provides: "The Surveyor-General, or other officer so authorized as aforesaid, shall then make his report to the Governor, whether the possession of the land is needed for the purposes for which it appeared likely to be needed as aforesaid. And upon the receipt of such report it shall be lawful for the Governor, with the advice of the Executive Council, to direct the Government Agent to take order for the acquisition of the land."

The procedure prescribed by the Act in the sections which have been read was followed, and an order was made by the Governor, with the advice of the Executive Council, directing the Government Agent to take order for the acquisition of the land.

The whole point in the case is whether the decision of the Governor in Council is conclusive on the point that the land is wanted for a public purpose. It is now contended that it is open to the person whose land is affected to challenge the decision of the Governor in Council upon this point, as embodied in the order directing the Government Agent to take order for the acquisition of the land.

This question has already been raised in the Courts of Ceylon. In the case of the *Government Agent* v. *Perera* (1) the very point now under consideration was raised and decided in the Supreme Court of Ceylon. It is enough to read the first two paragraphs of the head-note: "In the acquisition of a private land for a public purpose, the Governor is not bound to take the report of the Surveyor-General as to its fitness for such a purpose. His decision on the question whether a land is needed or not for a public purpose is final, and the District Court has no power to entertain objections to His Excellency's decisions."

It appears to their Lordships that that decision was manifestly right. The whole frame of the Ordinance shows that what the District Court is concerned with is the assessment of compensation, but their Lordships do not desire to rest

(1) 7 Ceylon N. L. R. 313.

their opinion that the decision of the Governor is final merely upon the question of the Court before which the question is raised. It appears to their Lordships that the decision of the Governor that the land is wanted for public purposes is final, and was intended to be final, and could not be questioned in any Court. The nature of the objection is such that it would be obviously unsuitable for the District Court, which is concerned with questions of compensation which would arise if the land is to be taken. But the question might also be raised in a preliminary way, as was suggested by Lord Wrenbury in the course of the argument. It might be raised by an application to the Court to stay the further proceedings on the ground that, although the Governor in Executive Council had made the order, it was not a case where the condition precedent of the Ordinance was really fulfilled —namely, that the land was wanted for a public purpose.

In their Lordships' opinion no such proceeding would be competent in such a case, and the decision of the Governor in Council, making an order under the latter part of s. 6 of the Ordinance, is final and conclusive.

Reference has been made to cases dealing with similar questions arising under statutory enactments in India. Their Lordships do not refer to those cases because the wording of the enactment is not the same, and their discussion might, to some extent, complicate what appears to their Lordships to be a very simple issue.

The whole case is decided, in the opinion of their Lordships, in the last three lines of s. 6 of the Ordinance : " And upon the receipt of such report it shall be lawful for the Governor, with the advice of the Executive Council, to direct the Government agent to take order for the acquisition of the land." When you have an enactment of that kind it shows that it was intended that the decision of the Governor in Executive Council on the point should be binding.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant : *Freeman & Cooke.*
Solicitors for respondent : *Burchells.*

[PRIVY COUNCIL.]

J. C.*
1919
March 13.

SHELLEY AND OTHERS . . . . . APPELLANTS;

AND

NEW SOUTH WALES INSTITUTION FOR THE DEAF AND DUMB AND THE BLIND, AND OTHERS . . . . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Commonwealth Estate Duty—Incidence of Duty—Will—"Different disposition"—"Testamentary expenses"—Estates Duty Assessment Act (No. 22 of 1914, Commonwealth), s. 35.

The Estates Duty Assessment Act (No. 22 of 1914, Commonwealth) imposes a duty upon the estates of deceased persons, and by s. 35 provides that "subject to any different disposition made by a testator in his will" the duty is to be apportioned among the beneficiaries proportionately to their interests.

A testator by his will, which was subject to probate according to the law of New South Wales, after making certain specific bequests gave the residue of his estate upon trust for conversion, and directed that out of the proceeds there should first be paid "all the expenses incident to the execution of the preceding trusts and my debts funeral and testamentary expenses":—

Held, that the Commonwealth estate duty was to be apportioned among the beneficiaries, the provision in the will not being a "different disposition" within the meaning of s. 35 above mentioned.

Order of the High Court of Australia affirmed.

APPEAL by special leave from an order of the High Court of Australia (September 7, 1917), reversing an order of the Supreme Court of New South Wales in Equity.

The appellants were beneficiaries under the will of Norman Shelley, late of Sydney, in the State of New South Wales.

The testator by his will, which was executed on July 31, 1914, appointed the Perpetual Trustee Co., Ld. (respondents to the appeal), executors and trustees, and after making certain specific bequests and devises devised and bequeathed unto his trustees the residue of his real and personal property upon trust for sale and conversion. As to the proceeds the

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, and LORD PHILLIMORE.

testator directed his trustees "thereout in the first place . . . . to pay or retain all the expenses incident to the execution of the preceding trusts and my debts funeral and testamentary expenses, and in the next place to pay to my said wife 500*l*." The will then declared certain trusts in the surplus of the proceeds, including trusts in favour of the appellants, and finally directed that the residue of the trust fund should be divided between the respondents the above-named institution, and the respondents the Royal Alexandra Hospital for Children, in certain proportions.

The testator died on January 17, 1915, and his will was proved on April 22, 1915, by the respondents the Perpetual Trustee Co., Ld., in the Supreme Court of New South Wales, under the Wills Probate and Administration Act (No. 13 of 1898, N.S.W.). Under s. 44 of that Act upon grant of probate all real and personal estate of the testator becomes vested in the executor. Under Acts of the State of New South Wales—namely, the Stamp Duties Act (No. 27 of 1898), the Probate Duties Amendment Act (No. 45 of 1899), and the Stamp Duties Amendment Act (No. 3 of 1914)—the payment of State probate duty, which is a graduated one on the aggregate value of a testator's real and personal estate, is a condition precedent to the issue of probate.

By the Estate Duty Assessment Act (No. 22 of 1914), which was an Act of the Commonwealth of Australia, a duty called estate duty was directed to be levied and paid on the value, as assessed under the Act, of the estate of all persons dying after the commencement of the Act. By s. 3 the estate comprised in the case of a person domiciled in Australia, his real property there situated and his personal property wherever situated.

Sect. 35 of the Commonwealth Act No. 22 of 1914, so far as is material, provided "subject to any disposition made by a testator in his will, the duty payable in respect of an estate . . . . shall be apportioned by the administrator among the persons beneficially entitled to the estate in the following manner: . . . ." By s. 3 "administrator" included "any executor to whom probate of a will is granted."

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The estate of the testator consisted of real and personal property of a value over 200,000*l.*, and the net assessable value for the purposes of the Commonwealth Act No. 22 of 1914 was 146,059*l.*; estate duty under that Act amounting to 19,005*l.* 13*s.* 9*d.* was claimed and paid. Probate duty in New South Wales was also paid.

On December 21, 1916, upon an originating summons taken out by the executors and trustees in the Supreme Court of New South Wales in Equity, Harvey J. made an order declaring that the above-quoted clause of the will amounted to a "different disposition" within the meaning of s. 35 of the Act.

Upon an appeal to the High Court of Australia by the above-named respondent Institution, the order of Harvey J. was reversed.

The judgment of the Court (Barton, Isaacs and Rich JJ.) was delivered by Isaacs J., who expressed the opinion that the words "expenses incidental to the execution of the preceding trusts" seemed to refer to the expenses attendant on actually carrying out the prior directions of the will after the trustee was clothed with the necessary authority, and that the "preceding trusts" were in contradistinction to the remaining trusts, and therefore the phrase could not refer to a general expense which covered both preceding and subsequent provisions of the will. They were also of opinion that the Commonwealth estate duty was clearly outside any reasonable interpretation of the expression "testamentary expenses." The appeal to the High Court is reported at 23 C. L. R. 351.

The Judicial Committee granted special leave to appeal.

1919. Feb. 24. *A. Grant K.C.* and *W. L. Richards* for the appellants. The clause in the will was a "different disposition" within the meaning of s. 35 of the (Commonwealth) Estate Duty Assessment Act, 1914, its effect being that the estate duty was payable out of the residue. Payment of the estate duty was a "testamentary expense" within the clause. As the effect of s. 34 (1) of the Act of 1914 an

administrator (which expression by s. 3 includes an executor) cannot deal with the estate in any way until that duty is paid or secured. But under legislation of the State of New South Wales although probate can be granted formally before the State probate duty is paid, probate does not issue until payment. Under s. 34 of the Commonwealth Act No. 22 of 1914 the estate duty is a first charge upon the estate, and by s. 17 for the purpose of assessing the duty the estate probate duty cannot be deducted. Payment of the estate duty was therefore as much a "testamentary expense" as payment of probate duty in England. But even if the payment of the estate duty was not a condition precedent to probate it was an expense properly incurred by the executors and payable out of the residue as a "testamentary expense": *Sharp* v. *Lush* (2); *In re Clemow* (3); *O'Grady* v. *Wilmot* (4); *Peter* v. *Stirling* (5); *In re Maurice* (6); and *In re Brewster.* (7) Further the duty was payable out of the residue under the first branch of the clause; it was an expense "incident to the execution of the preceding trusts," namely the previous dispositions of the estate. [Reference was also made to *Perpetual Trustee Co.* v. *Mackenzie* (8), subsequently reversed by the High Court of Australia. (9)]

Tomlin K.C. and *Darlington* for the respondents were not called upon.

March 13. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of

(1) The Estate Duty Assessment Act (No. 22 of 1914, Commonwealth): "Sect. 34 (1.) The duty assessed under this Act shall be a first charge upon the estate in priority over all other encumbrances whatever, and there shall not be any disposition of the estate or any part of it until the duty thereon has been paid or the Commissioner certifies that he holds security for payment of the duty sufficient to permit any specified part of the estate to be disposed of. (2.) Any administrator who disposes of any estate or part of it in contravention of this section shall, without prejudice to the recovery of the duty by any other means, be personally liable for the duty."

(2) (1879) 10 Ch. D. 468.
(3) [1900] 2 Ch. 182.
(4) [1916] 2 A. C. 231.
(5) (1878) 10 Ch. D. 279.
(6) (1896) 75 L. T. 415.
(7) [1908] 2 Ch. 365.
(8) (1917) 17 S. R. (N. S. W.) 660.
(9) (1918) 25 C. L. R. 172.

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the High Court of Australia, which varied a judgment of the Supreme Court of New South Wales, delivered by Harvey J. The question for decision is whether on the construction of the will of Norman Shelley, deceased, there is in the will a "direction," within the meaning of s. 35 of the Estate Duty Assessment Act, 1914, of the Commonwealth of Australia, in terms of which direction a duty, which otherwise would be apportioned among all the beneficiaries under the will in proportion to the value of their interests, is to be paid out of the proceeds to arise from the sale, conversion and getting in of the testator's residuary estate in such a way that it will fall on the residuary legatees alone. The High Court decided that there was no such direction, and that the appellants, who are among the specific and other legatees and devisees under the will, ought, in common with the residuary legatees, to bear apportioned shares of the duty as prescribed by the Act in the absence of any direction to the contrary.

Under the Constitution of Australia, as established by the Commonwealth Constitution Act of 1900, the States preserve their powers of regulating their own affairs in regard to, among other things, the probate of testamentary dispositions, and the imposition of probate duties on the estates of deceased persons. An Act of the Legislature of New South Wales passed in 1899 prescribes taxation to be levied in, among other cases, that of the probate of a will under which real or personal estate is disposed of. By s. 57 no probates or letters of administration are to issue until duty under the Act has been paid or security has been given for them, and the probate has been duly stamped. Sect. 51 of the Constitution Act of 1900 confers on the Commonwealth Parliament wide powers of taxation, but does not affect the legislative capacity of the States in regard to testamentary dispositions. In 1914 the Commonwealth Parliament passed an Act relating to duties on the estates of deceased persons. This Act provided that estate duty should be levied and paid upon the value of the estates of persons dying (as did the testator) after the date of the Act. By s. 10 the administrator (which term includes an executor to whom probate has been granted) is to furnish a statement

in due form of all the estate of the deceased person of which he is administrator. The statement is to set forth the descriptions and values of the items in the estate before deducting debts or other charges. Sect. 17 enacts that for the purpose of assessing the value for duty of the estate, the debts due and owing by the deceased at the time of his death are to be deducted from the gross value of the assessable estate if the deceased died domiciled in Australia. Sect. 34 provides that the duty assessed under the Act is to be a first charge on the estate in priority over all other encumbrances, and that there is to be no disposition of any part of the estate until payment of the duty or a certificate that security has been given for its payment, and an administrator who disposes of the estate in contravention of this provision is made personally liable for the duty. Sect. 35 is the crucial one for the purposes of the present appeal. It enacts that "subject to any different disposition made by a testator in his will, the duty payable in respect of an estate," with certain exceptions which are not material, "shall be apportioned by the administrator among the persons beneficially entitled to the estate" in proportion to the value of their interests, again with exceptions which need not be considered. There are also provisions enabling the authority to make separate assessments of the duty payable in respect of the separate interests of individual beneficiaries, which in that case are to be exclusively charged. The only other part of this Commonwealth Statute that need be referred to is the definition of debt in s. 3 as including probate and succession duties payable under any State law.

By his will, which became operative on his death subsequent to 1914, the testator, after appointing an executor and trustee and making various specific bequests and devises, gave his residue, real and personal, upon trust for conversion, and out of the proceeds to arise from it in the first place to pay all the expenses incident to the execution of certain preceding trusts and also his debts, funeral and testamentary expenses. He then, after directing other payments to be made, divided the

J. C. 1919 SHELLEY v. NEW SOUTH WALES DEAF, DUMB, AND BLIND INSTITUTION.

surplus proceeds arising from the conversion into seven portions, and prescribed how these should be applied. The respondent institutions are beneficially entitled to part of the residuary surplus so dealt with.

The testator left real and personal estate of the net assessable value for the purposes of the Commonwealth taxation under consideration of over 146,000*l.*, and on this the Federal Government were paid over 19,000*l.* for duty under the Act of 1914. A summons was then taken out by the trustees of the will to have it determined whether the provision in the will that there should be paid out of the proceeds of the conversion the expenses incident to the execution of the preceding trusts and the testamentary expenses, amounted to a "different disposition" within the meaning of the words of exception in s. 35 of the Act of 1914, prescribing general apportionment among the beneficiaries under a will. This summons came before Harvey J., who held, in favour of the beneficiaries generally, including the present appellants, that payment of the estate duty imposed by the Commonwealth Act was, in the State of New South Wales, a testamentary expense, and also an expense incident to the trusts in the will preceding the direction in question.

On appeal to the High Court, Isaacs J. delivered a judgment, concurred in by Barton and Rich JJ., reversing this decision. The learned judges of the High Court were of opinion that the expression in the will "expenses incident to the execution of the preceding trusts" referred only to the expenses attendant on actually carrying out the prior directions of the will, after the trustee was clothed with the necessary authority, such as the payment of rates, taxes, and outgoings in connection with certain house property devised on trust to be kept up as a residence. As to the other point, that the duty was a "testamentary expense," the High Court held that the payment of the duty need not take place before the issue of probate, and that it was not a condition precedent to the complete investiture of the administrator with title.

Their Lordships have arrived at the same conclusion as did the High Court. The expression "testamentary expense," in

certain decisions in the Courts of England which have been cited to them, has been given a wide meaning. But this meaning was in each of these decisions derived from a context different from that in the will before them read in conjunction with the Commonwealth statute. That statute is not concerned with the grant of probate, which is matter for the law of the State of New South Wales. The Federal Parliament directs its legislation merely to the imposition of a tax on the value as assessed under its Act of the estate in the hands of a person charged as its administrator. That administrator, who derives his appointment from the law of New South Wales, is directed by the Federal Act to apportion the duty payable among the beneficiaries generally in proportion to the value of their interests, unless a different disposition is made in the will. Their Lordships think that this enactment assumes that before the tax is made effective he has already been clothed with title, and that the payment by him of the tax is the discharge neither of a testamentary expense nor of any expense incident, within the meaning of the language of the will before them, to the execution of "the preceding trusts," which they interpret as bearing the restricted meaning to which reference has already been made. If so there is in the will no "different disposition" which excludes the ordinary principle of apportionment prescribed by the statute.

Their Lordships are accordingly of opinion that the appeal fails, and they will humbly advise His Majesty that it should be dismissed. The appellants will pay the costs of this appeal of the New South Wales Institution for the Deaf and Dumb and the Blind and the Royal Alexandra Hospital for Children.

Solicitors for appellants: *Chapman-Walker & Shephard.*
Solicitors for respondents: *Kimbers & Boatman.*

[PRIVY COUNCIL.]

J. C.*
1919
April 3.

BRITISH AMERICA ELEVATOR COMPANY, LIMITED . . . . . } APPELLANTS ;

AND

BANK OF BRITISH NORTH AMERICA RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA.

Banker—Drafts—Agreement to furnish Currency—Crediting Agent's Account —Misapplication of Trust Fund—Measure of Liability.

The respondent bank agreed with the appellants to furnish the appellants' agent with cash in exchange for drafts upon the appellants. The cash, as the respondents knew, was to be used in paying for grain to be purchased for the appellants by their agent. In numerous cases the respondents instead of giving the agent cash credited the drafts, wholly or in part, to the agent's private account which was generally overdrawn. The appellants sued the respondents to recover the aggregate amount, with interest, of specified drafts or parts of drafts which had been thus applied ; the agent was not joined as a party. The respondents alleged but did not prove that the agent had paid for grain by cheques on his private account. The Court of Appeal ordered an account to ascertain what loss the appellants had sustained:—

Held, that the respondents having been parties to a misapplication of trust funds, the appellants were entitled to judgment for the amount sued for.

APPEAL from a judgment of the Court of Appeal of Manitoba (November 16, 1916), varying a judgment of the Court of King's Bench.

The action was brought by the appellants against the respondents claiming payment of 13,528 dollars and interest ; they also claim that an account might be taken, but that claim was not proceeded with.

The facts appear from the judgment of their Lordships. The material part of the letter of September 15, 1911, referred to in that judgment was as follows : " We would . . . . like you to furnish the following points currency from your Rosthern branch : . . . . Waldheim (G. A. Youngberg, agent). . . . . It is understood that you will cash these drafts at the rate of

* *Present :* VISCOUNT HALDANE, VISCOUNT FINLAY, and LORD PHILLIMORE.

1.25 dollars per 1000 dollars." The respondents by their defence pleaded, inter alia, that payments were made for grain purchased from time to time by Youngberg for the appellants by cheques drawn upon his account and upon that of his firm; further that the amount of the cheques so drawn and applied was equal to that of the drafts credited to those accounts.

The trial judge, Galt J., found that of the cheques drawn upon the accounts of Youngberg and of his firm only one for a very small amount was in payment for grain, and that it did not appear whether the grain was for the appellants. He pointed out that the respondents' branch manager had admitted in evidence complete knowledge of the breaches in question, and had instigated many of them for the express benefit of the respondents. He held that under these circumstances the appellants were entitled to the return, with interest, of the money misapplied, and that it was not necessary for them to establish by evidence that they had sustained any particular loss. He gave judgment for the amount claimed with interest at 5 per cent. from the respective dates of misapplication.

Upon appeal the Court of Appeal (Cameron J. A. dissenting) considered that the judgment of the trial judge should be varied by directing a reference to ascertain what loss the appellants had sustained by reason of the drafts being credited to the accounts of Youngberg and of his firm, and that judgment should be entered for the amount of such loss (not exceeding 12,028 dollars) less the amount (if any) received by the appellants from Youngberg on account of those drafts. The figure 12,028 dollars resulted from a holding that the appellants were not entitled to recover the amount of the drafts for 500 dollars and 1000 dollars referred to in the judgment of their Lordships. Cameron J. A. was of opinion that the judgment of the trial judge should be affirmed.

1919. March 13, 17. *Sir Erle Richards K.C.* and *W. L. McCarthy K.C.* for the appellants. The respondents misapplied the proceeds of the drafts to the amount sued for.

J. C.
1919
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In so doing they were parties to a breach of trust and the appellants were entitled to judgment for that amount: *John* v. *Dodwell & Co.* (1) In any case, they were so entitled in the absence of proof by the respondents that the appellants had received the proceeds of the drafts in cash or grain. Owing to the complication of the transactions the order for a reference throws upon the appellants a burden which cannot be discharged. Alternatively, the respondents converted the drafts. In that case *North and South Wales Bank* v. *Irvine* (2) is an authority that the appellants are not bound to prove the loss which they ultimately sustained by the transactions. Upon the evidence the drafts for 1000 dollars and for 500 dollars are in the same position as the other drafts. [Reference was also made to *Gray* v. *Johnston* (3); *Coleman* v. *Bucks and Oxon Union Bank* (4); and *Morison* v. *London County and Westminster Bank.* (5)]

Hogg K.C. and *Hon. M. Macnaghten* for the respondents. The order of the Court of Appeal was rightly made. The evidence showed that Youngberg drew cheques upon his private account in payment for grain purchased for the appellants and that in other cases the purchase price was set off against amounts due from farmers to Youngberg's firm. Further there were payments by Youngberg to the appellants in the grain account. The appellants consequently had, either in grain or in money, the advantage of part at least of the sum now claimed. It was admitted in the Court of Appeal that the total indebtedness of Youngberg to the appellants was less than the amount sued for. The principle of *Bannatyne* v. *MacIver* (6) applies. In any case the appellants were not entitled to recover in respect of the drafts for 500 dollars and 1000 dollars. The 500 dollars was credited to Youngberg before the branch bank had been notified of the arrangement with the appellant. Youngberg's cheque for 1000 dollars in favour of the appellants was paid out of the proceeds of the draft for 1000 dollars; the effect of

(1) [1918] A. C. 563.
(2) [1908] A. C. 137, 141.
(3) (1868) L. R. 3 H. L. 1.
(4) [1897] 2 Ch. 243.
(5) [1914] 3 K. B. 356.
(6) [1906] 1 K. B. 103.

the judgment of the trial judge is that the appellants would receive the amount of the draft twice.

Sir Erle Richards K.C. replied.

April 3. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The Court of Appeal of the Province of Manitoba varied a judgment of Galt J. delivered in this case in favour of the appellants (the plaintiffs) for 15,218 dollars. The Court of Appeal substituted for this judgment an inquiry as to what loss the appellants had sustained by reason of certain drafts set out in the statement of claim having been credited in the books of the respondent bank to the account of one Youngberg or to the account of the firm of Youngberg and Vassie. Youngberg was an agent of the appellant company who also carried on a business on his own account and another business along with Vassie, as dealers in agricultural implements and other things required by farmers. The inquiry ordered by the Court of Appeal was further directed to the amount that the appellants had received from or on behalf of Youngberg on account of the drafts set out in the statement of claim, and the respondents were declared liable for the balance, such balance not to exceed the sum of 12,028.10 dollars. The difference between this amount and that for which the trial judge gave judgment was arrived at by deducting two sums of 500 dollars and 1000 dollars, representing drafts for which the respondents were held by the Court of Appeal not to be liable.

The appellant company has its head office at Winnipeg, and it owns a number of grain elevators in Manitoba and Saskatchewan, one among them being at Waldheim. The business carried on at these elevators was regulated by the Manitoba Grain Act, which provides, among other things, that when grain is bought by the owner of the elevator from the farmer (as distinct from being received for storage) a cash purchase ticket in a prescribed form shall be issued to the seller. Those who receive these cash purchase tickets are entitled to payment of the amounts within twenty-four hours from the time of receiving them. The elevator owner

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usually appoints someone to be paymaster for these tickets, and in this case Youngberg was appointed to be the appellants' paymaster at Waldheim. There was no bank there, but the respondents had a branch at Rosthern, which, it is agreed, was some fifteen miles off. As the amounts on the tickets had to be paid in currency, the appellants arranged with the respondents that the latter should furnish from Rosthern to the paymaster of the appellants at Waldheim money to meet the payments that had to be made there. These arrangements, as appears from the correspondence immediately prior to a letter of September 15, 1911, written on behalf of the appellants to the respondents' superintendent, were in existence before that date, and they were renewed in the letter referred to (in all particulars that are material for the present purpose), by which letter the appellants requested the respondents for a certain commission to furnish currency from their Rosthern branch to Waldheim, G. A. Youngberg being the agent designated. This was agreed to. The terms of the letter are important, for they settled with precision what was to be for the future the course of business between the appellants and the respondents. The money was to be furnished from the Rosthern branch of the respondents' bank to Waldheim, where Youngberg was the appellants' paymaster, against dratts by Youngberg on the appellants. The respondents' commission was to be 1.25 dollars per 1000 dollars.

Youngberg and Vassie had an account with the Rosthern branch of the respondent bank, of which one Rostrup was the local manager. Youngberg had also a separate private account there. These accounts were from time to time overdrawn during the period of the transactions in question in this appeal. Rostrup, the local manager of the bank, was pressing them to cover the overdrafts, and the head office was urging him to see to this.

It is obvious that, having regard to the terms of the letter of September 15, 1911, which defined what was to be the course of business, the proper procedure was that Youngberg should, as occasion required, have estimated as closely as possible the amount necessary to provide for the payments

he had to make on behalf of the appellants in respect of grain tickets, and to have drawn on the respondents only for those amounts. On presentation of the drafts at the Rosthern branch Rostrup would have sent to him or handed to him currency for the amounts drawn for, and have forwarded the drafts to the bank's head office at Winnipeg to be collected from the appellants' head office there. Instead of doing this Rostrup allowed Youngberg to pay the amount of the drafts he presented, on behalf of the appellants and under the terms of the letter, with increasing frequency into his firm's account or his own, thereby putting these accounts, which were generally overdrawn, into credit. When this was done he drew cheques on them generally. It is not in dispute that Rostrup had full notice from the beginning that Youngberg was paying the amounts of the appellants' drafts, which could be given only in terms of the letter of September 15, into the private accounts of his firm and himself, and was then drawing cheques for his own purposes on these accounts.

Their Lordships think not only that it is plain that Rostrup knew throughout that Youngberg was directing him to act improperly in crediting to his firm's and his private accounts the amounts of the appellants' drafts, which were allowed to be drawn only for the purpose of currency being furnished to Waldheim to pay there the sums due under the grain tickets issued by the appellants, but that the directions given were in violation of the terms of the letter of September 15, 1911, a letter which prescribed the continuation of an existing practice in terms. If so, it is clear upon principle that the respondents, through Rostrup, knowingly became parties to a misapplication of what were trust funds, which they must restore to the appellants. The majority of the learned judges in the Court of Appeal appear to have treated the action as one which must be regarded as brought simply for damages for a breach of agreement, in which the burden lay on the plaintiffs to prove the quantum of damage suffered by them. This view is quite inadequate. Possibly the learned judges in the Court of Appeal were led to hold as they did by the fact that, instead of asking for a general declaration of liability

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on the ground of breach of trust, and for an account to be taken of all the sums so received, in which case the result of the account, after any proper deductions had been claimed and established on the initiative of the respondents, would have been followed by a judgment on further consideration for the balance found due, a different course was followed at the trial. The appellants claimed certain specific sums, amounting to 13,528.10 dollars, which they said had been misapplied in breach of trust, and did not persist in a further claim they made for an account of any other moneys for which the respondents might prove to be similarly accountable to them. The case was tried on this footing.

There were two sums of 500 dollars and 1000 dollars respectively as to which there was special controversy in the Court of Appeal. The first of these was the subject of one of the appellants' drafts, which was credited to Youngberg and Vassie by Rostrup on September 15, 1911, just before he was notified of the letter to the headquarters of the respondent bank of that date. At this date the account of Youngberg and Vassie at Rosthern was overdrawn, and the amount was applied in reducing it. This was, in their Lordships' opinion, improper, having regard to the practice which existed even before the letter of September 15, 1911, and to the duty of a banker who has notice that he is receiving a trust fund. It was improper of Rostrup to allow Youngberg to operate on his firm's account by treating the 500 dollars as though it was money belonging to the firm, and of which he could dispose as such. Similar observations apply to the draft for 1000 dollars dated later on, on February 13, 1912, and credited to Youngberg on the 16th of that month. It represents the amount of a cheque for part of the balance due from him to the appellants, given by Youngberg to Black, the appellants' inspector. The cheque was dishonoured, owing to the overdrawn condition of Youngberg's account, and he then drew on the appellants for the amount and sent the draft to Rostrup for payment to his own credit, and the cheque was paid. The majority in the Court of Appeal held that if the draft had not been so credited the original cheque would not have been paid, and that therefore to charge

the respondents with the amounts of both the cheque and the draft would be to make them pay twice over. With this view their Lordships are unable to agree. There is not evidence before them sufficient to establish that the respondents have been charged twice with this identical amount. They think that, as the cheque was drawn to pay to the appellants their own money, being cash in hand with Youngberg, they were entitled to hold it, and that they were entitled to treat the payment of the draft to Youngberg's own account as a breach of duty on the part of Rostrup. They think that the trial judge and Cameron J.A. were right in treating these items as standing on the same footing as the other items in the total claim established at the hearing, and that the majority of the Court of Appeal were wrong in deducting the 1000 dollars. Their Lordships are unable to put this draft on a different footing from those before and after it. The respondents did not make good the contention put forward in argument, that this cheque for 1000 dollars was given to make good the amount of a previous draft for the same amount which had been misapplied, and that this would therefore involve a payment of the same item twice over. The cash which Youngberg had in hand as the appellants' agent was not made up merely of previous drafts misappropriated, but comprised moneys received by him for his principals, his cheque was given in respect of his liability for cash in hand generally, and the application of the draft on the appellants to recoup the respondents for payment of the 1000 dollars cheque was a misapplication of the draft with knowledge that the agent had no right to have it so applied.

The course adopted at the trial, of treating the items making up the amount for which judgment was given as raising questions of evidence at the hearing, may not have been the most convenient one. A full inquiry and account, based on a general declaration of liability, and taken subsequently with the burden of discharging themselves lying on the respondents, would probably have been the more adequate course. It would, moreover, have enabled the appellants to go into further possible items, in respect of which they did ask for cumulative relief in the shape of an account which would

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have extended to these items. But this course was not taken, and the appellants abandoned their further claim. The respondents set up a defence challenging the principle on which they were held liable at the trial, and alternatively they alleged that the amounts of the drafts in controversy were all discharged, having been repaid by cheques drawn on them by Youngberg or his firm in payment to the farmers who had sold grain. On the first contention the respondents were, in their Lordships' opinion, wrong. The Court of Appeal should have treated the claim as one for replacement of trust funds, and not for damages. The alternative contention the respondents did not establish by the evidence they gave at the trial. Having in view the course there taken, their Lordships are of opinion that the judgment of the majority of the Court of Appeal was erroneous in principle, and that the judgment of the trial judge must be restored.

It may be that the respondents may be entitled to some relief in possible proceedings against the appellants in the name of Youngberg or his assignee. To decide this would require an inquiry into the whole of the transactions between the respondents, the appellants, and Youngberg; and the presence of the assignee of the latter in his insolvency might be required. Their Lordships express no opinion on this subject. They can only deal with the case in the form in which it has been presented and on the materials which are before them, and they do not intend to prejudge any further questions.

For the reasons they have given they will humbly advise His Majesty that the judgment of the Court of Appeal should be reversed and that of Galt J. restored. The respondents will pay the costs here and in the Court of Appeal. The petition for special leave to cross-appeal lodged by the respondents will stand dismissed, and they will have their costs of the application to postpone the hearing of the appeal, such costs to be set off against the appellants' costs of the appeal.

Solicitors for appellants: *Smith, Goss, King & Gregory.*

Solicitors for respondents: *Bischoff, Coxe, Bischoff and Thompson.*

[PRIVY COUNCIL.]

MELBOURNE TRAMWAY AND OMNIBUS COMPANY, LIMITED . . . . . } APPELLANTS ;

AND

THE TRAMWAY BOARD . . . . . RESPONDENTS.

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[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Compensation—Compulsory Purchase—Tramway Rolling Stock—Effect of special Act—Lease—Covenant to hand over substituted and added Plant—Plant held in Reserve.

The appellants were lessees of tramways under a lease to expire on July 1, 1916, and were owners of rolling stock and plant. By an Act passed in 1915 the tramways were vested in the respondent Board thereby constituted, and "that there might be no interruption of the traffic" after July 1, 1916, the Act provided that the respondent Board should take over so much of the appellants' rolling stock and plant as they gave notice to acquire, also so much of the residue as the appellants did not wish to retain; that compensation should be determined by arbitration, but that as to things not included in the notice above mentioned regard was to be had only to their utility to the Board. The Act provided that the arbitrator should determine "the value of the subject-matter" in accordance with the specific provisions of the Act, and (if, and so far as necessary) the provisions of the Lands Compensation Act, 1915, but that no allowance was to be made for compulsory purchase; further, that the arbitrator should have authority to determine the matters submitted and all incidental matters "to the end that his award or awards may effect a final and equitable settlement." For rolling stock which was included in the respondents' notice the arbitrator awarded the sum which it would have cost to construct on June 30, 1916, less a deduction for depreciation:—

Held that, having regard to the position to which the Act gave rise and to its terms, the method adopted by the arbitrator was within his powers.

By the lease above referred to the appellants covenanted to maintain "all engines, boilers, machinery, ropes, plant, conveniences, or appliances now belonging to or used in connection with the said tramways, ... or which may . . . . be substituted therefor or added thereto for the purposes of the said tramways," and at the end of the lease to give up the demised property including "all such substituted or added property." The appellants bought certain plant which was held in reserve to deal with emergencies:—

Held, that the plant in question was not within the covenant, but was subject to the provisions of the Act as to compensation.

Judgment of the Supreme Court varied.

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, and LORD PHILLIMORE.

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APPEAL and cross-appeal from a judgment of the full bench of the Supreme Court of Victoria (June 1, 1917).

The Melbourne Tramway and Omnibus Co., Ld. (hereinafter referred to as the company), appealed, and the Tramway Board (hereinafter referred to as the board) cross-appealed from an order of the above-named Supreme Court, whereby an award made by Cussen J. as arbitrator appointed under s. 4 of the Tramway Board Act, 1915 (No. 2818, Victoria), was remitted for reconsideration upon certain matters.

The subject-matter of the reference and award was the amount of compensation which ought to be paid by the board to the company by reason of the acquisition by the board, under the above-mentioned Act, of certain property and assets belonging to the company and used in connection with the Melbourne Tramways.

The terms of the award, the material provisions of the above-mentioned Act, the effect of the judgment of the Supreme Court, and the material facts all appear from the judgment of their Lordships. The proceedings in the Supreme Court are reported at [1917] V. L. R. 472.

1919. Feb. 24, 25. *Sir John Simon K.C.*, *Tomlin K.C.* and *A. C. Nesbitt* for the appellants. Upon the special provisions of Act under which the arbitration took place, especially ss. 35, 46 and 48, the arbitrator rightly valued the assets as part of a working undertaking. The Land Compensation Act, 1915, applies only to land and has no bearing upon the matter. The arbitrator properly adopted structural value less depreciation as the basis of his award for the rolling stock. That basis effected an "equitable settlement" as provided by s. 46, sub-s. 1. But even if the matter is not governed by the special provisions of the Act, the arbitrator in adopting that basis acted in accordance with the true principles as formulated by the board in *Fraser* v. *City of Fraserville.* (1) [Reference was also made to *In re London County Council and London Street Tramways Co.* (2) and *National Telephone Co.* v. *Postmaster-General.* (3)]

(1) [1917] A. C. 187, 194. (2) [1894] 2 Q. B. 189.
(3) (1913) 29 Times L. R. 190.

Upjohn K.C., *Maugham K.C.* and *J. M. Gover* for the respondents. The appellants were entitled only to compensation upon the well-recognized basis of compensation—namely the value to the seller—but the award gave them considerably more, since there was no available market for the rolling stock. If the structural cost of the rolling stock was the proper test the actual cost of construction should have been ascertained, but the arbitrator excluded evidence as to that. The cost of construction in 1916 at the abnormally high prices due to the war was so excessive that it was not "equitable" within s. 46, sub-s. 1. The cable system was obsolete, and if a different system was adopted the rolling stock would have been of little value. The decision in *In re London County Council and London Street Tramways Co.* (1) was based upon an Act which provided for the payment of "the then value" of the subject-matter. Upon the cross-appeal, the spare plant and appliances in respect of which the arbitrator allowed compensation under para. 5 (*a*) and (*c*) of his award were "substituted" or "added property" which the company had covenanted to hand over to the lessors at the end of the lease, and were therefore not part of the subject-matter of the arbitration.

Sir John Simon K.C. (who was only called on as to the cross-appeal). The covenant in the lease does not apply to plant which was merely kept in reserve to meet emergencies.

March 31. The judgment of their Lordships was delivered by

LORD DUNEDIN. By Act No. 765 of 1883 of the Parliament of Victoria, the Melbourne Tramway and Omnibus Co., Ld. (hereinafter called the company) was empowered to construct tramways in the city of Melbourne and the adjoining boroughs. That Act contained a clause similar to that in the General Tramways Act of the United Kingdom, which provided that, at the expiry of twenty-one years after the passing of the Act, the local authority might acquire the tramways by paying the "then value, exclusive of an allowance for present or future profits of the undertaking." The Act further confirmed and incorporated a schedule which contained an agreement

(1) [1894] 2 Q. B. 189.

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with the various boroughs which provided that a Tramway Trust created under the Act should, if it so elected, construct the tramways and then lease them to the company for a period of thirty years. This election was made, and the tramways were constructed by the trust and handed over to the company. The tramways so handed over consisted of the lines and the motive power, it being a cable system. The rolling stock, etc., had to be provided by the company.

The company proceeded to work the tramways, and from time to time extensions were made under various supplementary Acts, but the arrangements as to construction and lease were always the same. The lease fell to expire on July 1, 1916. Had that date been allowed to arrive without arrangement the state of affairs would have been that the company would have found themselves the owners of tramway rolling stock and plant for which they had no use, and the trust would have found themselves in possession of a tramway system without the necessary appliances to make it effective. In order to prevent the dislocation which might thus ensue, the Legislature stepped in, and passed the Tramway Board Act of 1915. The title of that Act is: "An Act to make temporary provision with respect to tramways and tramway undertakings the subject of leases granted by the Melbourne Tramways Trust to the Melbourne Tramway and Omnibus Co., Ld., and to dissolve the said trust and for other purposes."

By it a new body called the Tramway Board was constituted, the old Tramway Trust was dissolved, and provision was made for the board carrying on the tramways after July 1, 1916. The property of the old trust—i.e., the permanent way and motive power appliances—was made over to the board by force of statute. As regards the property of the company, the following provisions were made: The company had to make a list of all things belonging to them. From that list the board was to select what they wished, which formed what may be called category A. Then the company, from what was left, were to form a list of what they wanted to keep; this formed category B. The remaining articles formed category C. Categories A and C were then by force

of statute transferred in property to the board, and for them the board were to pay.

It will be well to quote textually the important parts of the section which made these provisions. It is s. 34 : " (1.) In order that there may be no interruption of traffic on the said tramways, the following provisions shall apply to the tramway undertakings of the said company not the subject of the leases aforesaid (including the buildings, rolling stock materials, and tramway plant of the said company suitable, used or required for the purpose of working the Royal Park tramway)." Then (i.) provides for the inventory or list ; (ii.) for the list of things required by the board ; (iii.) for the list of things retained by the company ; (iv.) for the vesting of the things under (ii.) and the things included in neither (ii.) nor (iii.); (v.) The board shall in respect of all the things so vested make to the said company such compensation as is determined by arbitration under this Act, but with respect to the things which vest in the board under this sub-section, but are not specified in the notice of acquisition, the arbitrator in determining the amount of compensation to be made by the board therefor shall have regard only to their utility for the purposes of the board under this Act, and any subsequent owner of the said tramways and tramway undertakings."

By s. 44 it was provided that the arbitrator should be one of the judges of the Supreme Court appointed by the Governor in Council.

The proceedings directed by the Act were duly carried out, and an arbitration ensued. Cussen J. was the judge appointed, and he held an inquiry and pronounced an award.

The award, so far as material for the present case, was as follows : " Now I the said arbitrator do, subject to the statements hereinafter contained, determine the amount of the said compensation to be 335,000*l.*, and award the same accordingly. And I further declare that in arriving at such amount I have given effect to the principles or matters set out hereunder : (1.) I have had regard to June 30, 1916, as the date in relation to which the value of the said things

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was to be ascertained. (2.) In respect of many of the said things, including rolling stock, I have fixed their values by considering them as things in situ (or established, assembled, and arranged) capable of earning a profit, and in many cases this in my view necessitated fixing values practically by reference to structural cost less a proper deduction for depreciation. (3.) In fixing values as set out in para. 2, I have not regarded the possibility or probability of the cable tramway system being converted into an electrical tramway system, or considered statements made by witnesses on that subject. . . . . (5.) Having regard to my construction of the leases from the Melbourne Tramways Trust to the said company: (*a*) I have allowed the company compensation in respect of the spare wire ropes claimed for, whether such ropes were new or previously used. (*b*) I have not allowed the said company compensation in respect of an automatic stoker or in respect of reels and their accessories or in respect of some other things of small value which have either become incorporated with or accessory or incidental to the permanent fixed property or which have been added to the list of things supplied by the trust and used for the performance of similar functions. (*c*) Save as set out in para. (*b*) I have allowed the said company compensation for materials, tools and appliances claimed for whether such things were usually kept in the engine houses or not and whether such things were ordinarily described as spares or not. And I further declare that I have attached to my award as appendix A a statement of my reasons for giving effect to the principles and matters above referred to, and as appendix B a copy of the lease made by the said trust to the said company, and as appendix C a statement showing lists of things enumerated in the schedules to various leases from the said trust to the said company, and that such appendices, so far as they illustrate or explain the principles or matters above referred to and numbered 1 to 5, are to be taken as part of my award."

In the appendices mentioned the learned judge most carefully and ably discussed the various matters on which

argument had been held before him, and gave his reasons for his judgment.

Upon this the board made a motion to the Supreme Court to set aside the award or otherwise to remit the award for reconsideration by the arbitrator. This motion was discussed before the Supreme Court, consisting of Madden C.J. and Hodges and Hood JJ. The Court by a majority (Madden C.J. dissenting) remitted the award for reconsideration as to heads 2 and 3, but affirmed the decision as to the rest.

The company have appealed to His Majesty in Council against this judgment, and the board has cross-appealed as to the affirmance of heads 5 (*a*) and (*c*).

There was a question raised originally by the company whether, as the arbitrator had not stated his award in the form of a special case, any appeal against his award was possible. That question was decided adversely to the company by the Court of Appeal, and was not practically raised before this board; but it was conceded on both sides that the appeal competent was an appeal on questions of law only, and not on questions of fact.

It will be convenient at once to dispose of what may be termed the minor point of the principal appeal—namely, whether the arbitrator was wrong in disregarding, in fixing the compensation, the chance that the plant taken over might be rendered less valuable by the possibility of the whole system being converted into an electric system, which would render much of the plant unavailable. Their Lordships agree on this matter with the learned arbitrator, and with the learned Chief Justice. The probability of such a change appears on the evidence to rest entirely in the region of speculation, and not to justify any deduction from the compensation for the value of the things taken over.

The principal question, therefore, comes to this: Was the arbitrator wrong in law in estimating the compensation due for the plant by calculating the cost at which that plant would have been supplied at the date of transference, and then making a deduction for the fact that the plant was not new, but was partially worn out? The majority of the Court of Appeal have

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held this method to be wrong, and their judgment turns entirely on the meaning of the word "compensation." There is a long series of cases decided under the Lands Clauses Act which have laid down that compensation must be estimated as the value to the seller, and not the value to the buyer. Applying that doctrine, the learned judges are of opinion that the only matter to be considered is what the company could have got for its plant; and this, as the market was obviously a limited one, would have been only such sum as the board would be prepared to pay in order to outbid a buyer who would buy the plant in order to take it away elsewhere and employ it on some other system.

Their Lordships think that the learned judges have laid too much stress on the one word "compensation" employed in the section quoted, and have not considered sufficiently the scope of the Act as a whole. It must be remembered what the situation was. Had nothing been done, the position on the expiry of the lease would have been this: The company would have been deprived of the tramway for which the plant was primarily intended and useful. If a sale were forced, it could only, if the company were refused a renewal of the lease, be sold at a great disadvantage. On the other hand, the board would have had a tramway system without plant to work it, and the furnishing of new plant, if they failed to secure the plant belonging to the company, would have taken many months during which time their system would have been totally unremunerative. But besides this position of the parties—each in a position to injure the other, neither in a position to compel benefit to himself—there was the position of the public. The more obstinate the parties were as against each other the more the public would suffer. "Quidquid delirant reges plectuntur Achivi." It was in the interests of the public that the Legislature intervened, and in their Lordships' view the Act must be construed in the light of this position and these considerations. This idea is not left to the imagination; it is actually expressed in the statute in the opening words of s. 34, already quoted: "In order that there may be no interruption of traffic on the said tramways, the following provisions shall have effect":—

There are some other sections of the statute which it may be well to cite: Sect. 48. "In fixing any amount of compensation under this Act the arbitrator shall determine the value of the subject-matter of the arbitration in accordance with: (*a*) the specific provisions (if any) of this Act for determining the same; and also (*b*) (if, and so far as it is necessary), the provisions of the Lands Compensation Act, 1915, as to estimating compensation as if those provisions with the necessary modifications were applicable to the case"; and in particular: s. 46 (1.) "The authority of the arbitrator shall extend to the settlement and determination by him subject to this Act and on such terms and in such manner as is most just and fit of the matters referred to him and also of all such matters and questions (including any adjustments of accounts between the parties to the arbitration) as are in the judgment of the arbitrator incidental thereto or consequential thereon to the end that his award or awards may effect a final and equitable settlement."

So far as s. 48 (*b*) is concerned, it is clear that there is no contemplation of a universal adherence to the provisions of the Lands Compensation Act, so as to introduce a cast-iron view of what compensation must be, and the opening words suggest that compensation and value are, for the purposes of this Act, not antagonistic terms, as the learned judges of the majority suggest.

The outcome of the whole matter seems to their Lordships to be this: The primary object of the statute was to prevent an impasse and consequent injury to the public. To do this the two parties are by statute coerced, so to speak, into a settlement. On the one hand was the extreme position of exacting a fancy price for the plant, because that plant was the only plant available for many months. On the other was the valuation of the plant at a break-up value, which would mean what it would have fetched if bought to be removed to some other place where there was a cable system. Between these extremes the arbitrator was to fix such compensation as should effect "an equitable settlement." It seems to their Lordships that within reason he was made master of the situation.

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As a matter of fact, he has adopted the method of valuation which was adopted in the cases of the Edinburgh Corporation and the London County Council, where the words used were: "the then value of the tramway excluding profits of the undertaking." Their Lordships think that this method was clearly within the arbitrator's powers. In so saying they recognize that this is a special case arising on the provisions of a statute specially expressed, and they are not in the slightest degree criticizing or qualifying the series of decisions of which *In re Lucas and Chesterfield Gas and Water Board* (1); *Cedars Rapids Co.* v. *Lacoste* (2); and *Ruddy* v. *Toronto Eastern Ry. Co.* (decided on January 23, 1917, by this board) (3) may be taken as examples. They would further remark that though, owing to the importance of the case, and the fact that there was an equal division of judicial opinion among the judges of the Supreme Court (the arbitrator being himself a judge), they have thought it right to express their opinion in their own words, they do not conceive that they are adding anything to the very able and luminous judgments of Cussen J. as arbitrator, and Madden C.J. in the Supreme Court, with which judgments in ordinary circumstances they would have been content merely to express concurrence.

This disposes of the principal appeal. The cross-appeal remains.

The whole argument turns on what is meant by the clause in the lease which binds the company to maintain during the lease: "All engines, boilers, machinery, ropes, plant, conveniences or appliances now belonging to, or used in connection with, the said tramways (including those specified in the second part of the schedule hereto) or which may at any time hereafter or from time to time be substituted therefor or added thereto for the purposes of the said tramways," and at the end to give up the demised property, "including all such substituted and added property." As s. 34, which provides for vesting and arbitration, applies only to the tramway undertaking, "not the subject of the leases," it

(1) [1909] 1 K. B. 16. (2) [1914] A. C. 569.
(3) [1917] W. N. 34.

is clear that any property which by the terms of the lease the company is bound to hand over cannot be the subject of compensation.

The learned arbitrator in his opinion in appendix A says this: "I think the aggregate or heap which has to be considered is made up of the things which were in fact demised and these may be shortly described as the tramway tracks, cable, engine houses, fixed machinery with its accessories, reels, and a few odd tools. It is a question of fact when things are added to this aggregate or heap, but I think they might be added by being affixed to, and becoming incorporated with, the things which were in fact supplied by the trust or by being added to the list of things supplied by the trust and used to perform the same functions."

Their Lordships are of opinion that this is a correct statement of the law of the case. All that therefore remains is the application to the facts. As to this, so far as it depends on fact, the arbitrator is final. The arbitrator finds as a fact that: "What the trust in fact did was to construct the tramway tracks, to construct or establish engine houses, together with boilers, engines, etc., necessary to operate the endless wire ropes and to supply one new wire rope and certain reels and a small number of what may be called foundation or starting tools and other things of minor importance for each section. A list of the things so supplied may be obtained by referring to appendix C to this award and exhibits H 1 and I 1 which were put in at the hearing."

At one time in argument some doubt was suggested as to whether this statement could be supported on the evidence, but their Lordships have examined appendix C and exhibits H 1 and I 1, and are satisfied that it is supported by these exhibits.

The principal item on which discussion turned was the cables. Applying the proposition of law of the arbitrator, it seems to follow that it is enough if the company hand back what they got—a system so equipped as to be ready to work (and this applies not only to the original system, but to any extension thereof)—but that they are not bound to hand back

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articles which are merely kept to deal with emergencies, though the possession of such articles is a most proper precaution for a working company. Their Lordships therefore agree with the unanimous view of the judges that on this matter the arbitrator cannot be said to have gone wrong. On the contrary, as shown by his finding 5 (*b*), he has shown great discrimination in the application of the principle he laid down.

Their Lordships will, therefore, humbly advise His Majesty to allow the appeal, and to restore the award of the arbitrator; to refuse the cross-appeal; the appellants in the principal appeal and the respondents in the cross-appeal to have their costs in the court below and before this board.

Solicitors for appellants: *Wadeson & Malleson.*
Solicitors for respondents: *Sharpe, Pritchard & Co.*

[PRIVY COUNCIL.]

TORONTO GENERAL TRUSTS CORPORATION . . . . . } APPELLANTS ;

AND

THE KING . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Alberta)—Taxation—Succession Duty—Registered Mortgage—Property in Province—Succession Duties Act, 1914 (5 *Geo.* 5, *c.* 5, *Alberta*), *s.* 7.

A mortgage of land in the province of Alberta to a person domiciled in the province of Ontario was registered under the Land Titles Act of Alberta (6 Edw. 7, c. 24). That Act provides that a mortgage after registration shall be retained in the office of the registrar of titles. The mortgage was executed in duplicate, the registrar and the mortgagee each retaining one of the documents; that retained by the mortgagee was in his possession when he died in Ontario:—

Held, that the debt secured by the mortgage was property of the mortgagee in Alberta and was accordingly chargeable with succession duty under s. 7 of the Succession Duties Act, 1914 (5 Geo. 5, c. 5), of that Province.

Commissioner of Stamps v. *Hope* [1891] A. C. 476 discussed.

Judgment of the Supreme Court of Canada affirmed.

APPEAL by special leave from a judgment of the Supreme Court of Canada (October 9, 1917) affirming a judgment of the Appellate Division of the Supreme Court of Alberta, which affirmed a judgment of Hyndman J.

The action was brought in the Supreme Court of Alberta against the appellants to recover succession duty under the Succession Duties Act, 1914 (5 Geo. 5, c. 5), of that Province. The following special case was stated by agreement :

1. The defendants are the administrators, with the will annexed, of Richard Grigg deceased, who died at the city of Ottawa, in the province of Ontario, on or about January 5, 1916, and who had prior to and at the time of his death his domicil in the province of Ontario. 2. The property passing by the will of the

* *Present :* VISCOUNT HALDANE, VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, and LORD SHAW OF DUNFERMLINE.

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deceased is of an aggregate value sufficient to make such property as is situate within the province of Alberta liable to pay succession duty under the Succession Duties Act (1) at certain rates. 3. Part of the property left by the deceased, and passing on his death, consisted of mortgages secured upon lands in the province of Alberta made in favour of the said Richard Grigg in his lifetime, and made under the Land Titles Act. (2) 4. The said mortgages were executed under the seal of the mortgagors and contain covenants for payment of principal, interest, etc., as well as the statutory covenants provided for by the Land Titles Act. (2) 5. A duplicate of each of the said mortgages was in the custody and possession of the deceased, Richard Grigg, at his place of business in the city of Ottawa, in the province of Ontario. The other duplicate of each of the said mortgages was registered in the proper Land Titles office in the province of Alberta, under the provisions of the Land Titles Act. 6. It is agreed that the Court may without the necessity of evidence being adduced as to the law of Ontario decide whether by that law the mortgages in question herein are specialty debts ?

The question submitted for the opinion of the Court was, whether the mortgages above described were property upon which succession duty was payable in Alberta.

The trial judge, Hyndman J., held that succession duty was payable. By arrangement between the parties an appeal to the Appellate Division was formally dismissed without argument. Upon a further appeal to the Supreme Court of Canada, that Court (Fitzpatrick C.J. and Davies, Idington, Duff JJ., Anglin J. dissenting) affirmed the decisions. The appeal to the Supreme Court of Canada is reported at 56 Can. S. C. R. 26.

1919. March 21. *Douglas Hogg K.C.* and *Horace Douglas* for the appellants. The mortgage debt was not property situate in the province of Alberta. The mortgage did not create any interest in the mortgaged lands. The situs of a specialty debt is the place where the instrument is

(1) 5 Geo. 5, c. 5 (Alberta). (2) 6 Edw. 7, c. 24 (Alberta).

"conspicuous," that is where it actually is: Wentworth's Office of Executor, 1720 ed., p. 46. That rule has been recognized in Canada, e.g., in *In re Muir Estate* (1), which supports the appellants' contention. The instrument here to be considered is the mortgage deed which was in the possession of the testator in Ontario. The duplicate deposited with the registrar cannot be regarded as the original deed. The Land Titles Act does not require that the document deposited shall be under seal, and s. 65, sub-s. 5, shows that the deposited duplicate is not "the mortgage." The decision of the Board in *Commissioner of Stamps* v. *Hope* (2) is conclusive in the appellants' favour, since in that case a duplicate of the mortgage must have been deposited with the registration officer in New South Wales under s. 35 of 26 Vict. No. 9 of that State. If the situs of a mortgage debt were the place of registration obvious difficulties would arise where the land was in different provinces. [Reference was also made to *Payne* v. *The King* (3); *Walsh* v. *The Queen* (4); *Henty* v. *The Queen* (5); and *Rex* v. *Lovitt.* (6)]

Sir John Simon K.C. and *Hon. M. Macnaghten* for the respondent. The question to be considered is, where is the secured debt situated? It is situated in Alberta since it is by the legislation of that province that the security is protected by registration and its transfer has to be effected: see Dicey's Conflict of Law, 2nd ed., pp. 746, 751. It does not appear from the report of *Commissioner of Stamps* v. *Hope* (2) that the mortgage there in question was deposited with the registration officer. The report of the argument in *Payne* v. *The King* (7) shows that the third instrument there considered, a mortgage of land in New South Wales, was in the hands of the testator in Victoria; Lord Macnaghten in delivering the judgment said "the debt, though a specialty debt in New South Wales, was a simple contract debt in Victoria." *Commissioner of Stamps* v. *Hope* (2) was cited to the Board in that appeal and was discussed in the argument. Equally in the present case there was a specialty debt in Alberta. The

(1) (1915) 51 Can. S. C. R. 428.
(2) [1891] A. C. 476.
(3) [1902] A. C. 552.
(4) [1894] A. C. 144.
(5) [1896] A. C. 567.
(6) [1912] A. C. 212.
(7) [1902] A. C. 552, 554, 560.

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appellants' rights arise in the province, and under the jurisprudence of the province. [They were stopped.]

April 11. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal by the administrator with the will annexed of Richard Grigg, deceased, from a judgment of the Supreme Court of Canada, affirming a judgment of the Supreme Court of the Province of Alberta, Appellate Division, which in its turn affirmed a judgment of Hyndman J. upon a special case submitted to him. The effect of the judgments under appeal was to declare that certain mortgages secured upon land in the province of Alberta which were held by the testator, who was domiciled and died in the province of Ontario, were subject to succession duty in the province of Alberta, and the question raised by this appeal is whether they were in fact so subject.

By s. 92 of the British North America Act, 1867, it is provided that in each province the Legislature may exclusively make laws in relation (among other matters) to direct taxation within the province. By s. 7 of the Succession Duties Act of Alberta (Alberta Statutes of 1914, c. 5) it is enacted that: "Save as otherwise provided, all property of any person situate within the province and passing on his death shall be subject to succession duties," at certain rates therein set forth. By s. 3 of the same Act the word "property" is defined as including real and personal property of every description. It was clearly within the power of the Legislature of the province of Alberta to pass the Succession Duties Act above referred to, and the only question is whether the mortgages referred to in these proceedings were at the date of the testator's death "situate within the province."

The mortgages in question were executed and registered under the Land Titles Act of Alberta (Alberta Statutes of 1906, c. 24). By s. 23 of that Act it is enacted as follows: "Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of

execution ; and the registrar, upon registration thereof, shall retain the same in his office, and so soon as registered every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument."

By s. 60 of the same Act it is enacted that mortgages shall be in a form set out in the schedule to the Act. This form does not provide for sealing, but a seal was in fact affixed to each of the mortgages in question in this case. No express provision is made in the Act for the execution of mortgages in duplicate, but the language of s. 63 and s. 65, sub-s. 5, appears to assume that a duplicate will be executed and retained by the mortgagee, and this appears in fact to be the general practice. In the present case each of the mortgages was executed in duplicate, one of such duplicates being delivered to and retained by the registrar in accordance with the statute, and the other being delivered to the mortgagee and retained by him. At the date of the death of the mortgagee the duplicate mortgages delivered to him were in his possession at his residence in Ottawa, in the province of Ontario, where he died, while those deposited at the registry were, of course, in the possession of the registrar in Alberta.

A claim to succession duty having been made, the administrator contended that the mortgages in question were, at the date of the testator's death, situate, not in Alberta, but in Ontario, and supported his contention by reference to the rule of law which provides that, whereas a simple contract debt is to be deemed to be within the area of the local jurisdiction within which the debtor for the time being resides, the locality of a specialty debt is the place where the specialty is found at the time of the creditor's death: Wentworth on the Office of Executor, ed. 1720, p. 46 ; Bacon's Abridgment, tit. Executors and Administrators (E), p. 462 ; *Gurney* v. *Rawlins* (1); *Commissioner of Stamps* v. *Hope*. (2) This rule has been recognized in numerous decisions both here and in the Dominion of Canada, and the general principle must be regarded as well

(1) (1836) 2 M. & W. 87. (2) [1891] A. C. 476.

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settled. But in the present case there is a difficulty in applying the rule, owing to the fact that each of the mortgages was created and evidenced by duplicate deeds, and that at the date of the testator's death one of the deeds was in the province of Ontario and the other in the province of Alberta. An attempt was made to show that, having regard to the terms of the Land Titles Act, the duplicate of each mortgage held by the testator was the principal or dominant instrument, but in their Lordships' opinion no such ascendancy was made out, and the deed produced to and retained by the registrar under the provisions of the statute was not of less importance than the duplicate delivered to and retained by the mortgagee. In these circumstances any argument which goes to show that, under the rule which fixes the locality of a specialty debt in the place where the specialty is found, the debts in this case were situate in Ontario at the testator's death, is equally effective to prove that they were situate in Alberta; and yet it is plainly impossible to hold that they were situate in both provinces at once. A similar difficulty in applying the rule may arise in any case where an obligation is created or evidenced by two or more deeds of collateral value which are found in different jurisdictions; and the truth appears to be that in such cases the rule gives no guidance on the question of the locality of the debt, and regard must be had to the other circumstances of the case.

In the present case the circumstances, other than the single fact of the presence of a duplicate deed in the province of Ontario, are all in favour of the conclusion that the mortgages were situate in Alberta. It is established by formal admissions made in the course of the proceedings that at the date of the execution of the mortgages the mortgagors were resident in the province of Alberta, and that the place of payment of the debt was in each case in the province of Alberta. The debts were secured, not only by the personal obligation of the mortgagors, but also by mortgages which created interests in lands in Alberta, and this fact cannot be put out of account. See *Walsh* v. *The Queen*. (1) The mortgages are executed in a

(1) [1894] A. C. 144, 148.

form prescribed by the Land Titles Act of Alberta, and derive their force and effect from the terms of that statute, and this is not less the case because a seal has been voluntarily affixed to each mortgage. The administrator cannot enforce any of his securities without procuring registration of his succession in the Alberta registry and relying on documents registered in that province; and though the debtors may be prepared to pay the debts secured without putting the administrator to the trouble of suing or of realizing his securities, it is plain that they would not do so except on the terms of the mortgaged lands being released in accordance with Alberta law. In short, the administrator cannot recover the debts or have the benefit of his securities without claiming the protection and assistance of the Alberta law; and the case falls within the test laid down by Lord Cranworth in *Wallace* v. *Attorney-General* (1) as to the limitation on the imposition of succession duty, namely, that such a duty must be considered to be imposed only on those who claim title by virtue of the law of the taxing State.

When all these circumstances are taken into account, the only possible conclusion appears to be that the mortgages in question in this case were at the testator's death situate in Alberta. This conclusion is in accordance with the decisions of the Board in the cases of *Walsh* v. *The Queen* (2); *Henty* v. *The Queen* (3); and *Payne* v. *The King* (4); and is not inconsistent with the judgment in *Commissioner of Stamps* v. *Hope*. (5) It is indeed suggested that, as the mortgage referred to in the last-mentioned case was registered in New South Wales, it must be assumed that it was executed in duplicate, and that one original was filed in the office of the Registrar-General of New South Wales in accordance with s. 35 of the Real Property Act of New South Wales (26 Vict. No. 9), and accordingly that the decision governs the present case. But no reference to such an execution in duplicate is found either in the record of the case, in the arguments of counsel, or in the judgment of the Board; and the case cannot therefore be taken as an

(1) (1865) L. R. 1 Ch. 1, 9.
(2) [1894] A. C. 144.
(3) [1896] A. C. 567.
(4) [1902] A. C. 552.
(5) [1891] A. C. 476.

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authority on the question of the locality of a deed of which duplicates are found in two different jurisdictions. (1)

For the above reasons their Lordships have come to the conclusion that this appeal should be dismissed.

Their Lordships understand that it has been agreed by the parties that they will bear their own costs of the appeal. No order therefore will be necessary respecting them.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Bischoff, Coxe, Bischoff & Thompson.*

Solicitors for respondents: *Blake & Redden.*

(1) As the special case in *Commissioner of Stamps* v. *Hope* described the mortgaged lands as "runs or Crown leaseholds" (see 12 N.S.W.R. 220) they presumably had not been brought under 26 Vict. No. 9 (see s. 12). The registration of the deed therefore would appear not to have been under that Act but under the Deeds Registration Act, 1843 (7 Vict. c. 16); that Act, by s. 13, requires only a copy signed by one of the parties to be deposited.

[PRIVY COUNCIL.]

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ELECTRICAL DEVELOPMENT COMPANY OF ONTARIO . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR ONTARIO AND HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Action—Summary Dismissal—Fiat of Attorney-General—Ultra Vires.

The appellants issued a writ against the Attorney-General for Ontario and a Commission constituted by the Ontario Legislature, claiming a declaration that the Commission had no legal right to do certain acts which the Ontario Legislature had purported to empower it to do. The Act constituting the Commission provided that no action should be brought against it without the consent of the Attorney-General for Ontario, which had not been obtained. The Appellate Division affirmed orders whereby the writ was summarily set aside. The appellants contended that the statute under which the acts had been done and the provision requiring the consent of the Attorney-General were both ultra vires:—

Held, that the action should be allowed to proceed, the questions whether it was competent against either defendant being left for decision at the trial.

Order of the Appellate Division reversed.

APPEAL from two orders of the Appellate Division of the Supreme Court of Ontario (January 12, 1917) affirming orders of Middleton J., who affirmed orders of the Master whereby the issue and service of a writ of summons issued by the appellants against the respondents was set aside against each respondent.

The facts appear from the judgment of their Lordships.

The appeal to the Appellate Division is reported at 38 Ont. L. R. 383.

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, VISCOUNT CAVE, LORD SHAW OF DUNFERMLINE, and LORD PHILLIMORE.

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1918. March 18. *Sir John Simon K.C.*, *Hon. F. Russell K.C.*, and *D. L. McCarthy K.C.* for the appellants. The appellants should have been allowed to proceed to trial; the only question at present before the Board is whether they were rightly prevented from doing so. The action was properly brought against the Attorney-General for a declaration: *Dyson* v. *Attorney-General*. (1) The procedure by which an action can be summarily dismissed before trial on the ground that there is no reasonable cause of action "is only appropriate to cases which are plain and obvious": *per* Lindley M.R. in *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark*. (2) The consent of the Attorney-General was not necessary under R. S. Ont., 1914, c. 39, s. 16, because the action was not for anything done or omitted in the exercise of the office of the Commission. Further the Ontario Legislature was not competent to prevent the appellants from challenging the validity of the Ontario Niagara Development Act, 1916; that Act was ultra vires the provincial Legislature having regard to the British North America Act, 1867, s. 91, heads 10, 29, and s. 92, heads 10, 13. [Reference was also made to *Rendall* v. *Blair*. (3)]

Upjohn K.C. and *Micklethwait* for the respondent, the Attorney-General for Ontario. The action was not competent against the Attorney-General and the writ as against him was properly set aside. The action was based upon an alleged breach of contract by the Crown, and the only proper mode of procedure was by petition of right: *Hosier Brothers* v. *Earl of Derby*. (4) *Dyson* v. *Attorney-General* (1) was of an entirely different character from the present action, which is not within any of the classes of action which a subject can bring against the Attorney-General as representing the Crown. In *Eastern Trust Co.* v. *McKenzie, Mann & Co.* (5) the principle of the last-named case is expressly limited to cases in which no petition of right lies. Sect. 33 of the Ontario Judicature Act (R. S. Ont., 1914, c. 56) shows that the Attorney-General party was not properly joined as a party.

(1) [1911] 1 K. B. 410.
(2) [1899] 1 Q. B. 86, 91.
(3) (1890) 45 Ch. D. 139.
(4) [1918] 2 K. B. 671.
(5) [1915] A. C. 750, 759.

Hellmuth K.C. and *Hon. M. Macnaghten* for the respondent Commission. The writ as against the defendant commission was properly set aside both under the inherent jurisdiction of the Court and under r. 261 of the Supreme Court Rules, which refers to actions which are frivolous and vexatious. In the absence of the fiat of the Attorney-General the action was wholly incompetent having regard to s. 16 of R. S. Ont., 1914, c. 39. Under the British North America Act, 1867, s. 92, heads 13 and 14, the Ontario Legislature had power to enact that an action should not lie against the Commission, or that it should lie only with the consent of the Attorney-General of the Province: *Florence Mining Co.* v. *Cobalt Lake Mining Co.* (1); *Smith* v. *City of London* (2); *Beardmore* v. *City of Toronto.* (3) The only cause of action appearing in the writ is breach of contract, but the breach was validated by statute. The writ does not allege ultra vires, but in any case there is no reasonable ground for alleging that the Act is ultra vires.

Sir John Simon K.C. in reply. Sect. 16 is ultra vires if it is to be construed as applying to an action whereby the validity of the statute under s. 92 of the British North America Act is challenged. It is of the essence of the Canadian constitution that the determination of the legislative powers of the Dominion and of provinces respectively should not be withdrawn from the judiciary. Owing to the division of legislative powers in Canada, cases in which the Attorney-General can be called upon to justify the validity of an enactment are not so exceptional as in England. [Reference was made to *Flint* v. *Attorney-General* (4); *China Mutual Steam Navigation Co.* v. *MacLay* (5); and *Dow* v. *Black.* (6)]

April 7. The judgment of their Lordships was delivered by

VISCOUNT FINLAY. The question in this case is whether the writ of summons in the action was properly set aside. The action is one which raises questions as to the right to use the

(1) (1909) 18 Ont. L. R. 275 (3) (1910) 21 Ont. L. R. 505
1910) 102 L. T. 375. (4) [1918] 2 Ch. 50.
(2) (1909) 20 Ont. L. R. 133. (5) [1918] 1 K. B. 33, 37.
(6) (1875) L. R. 6 P. C. 272, 280.

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water of the Niagara River for the purpose of generating electricity.

By a treaty made in 1909 between His Majesty and the United States, which was confirmed by the Dominion of Canada Act of 1 & 2 Geo. 5, c. 28, an arrangement was made to limit the diversion of water from the Niagara River, and it was agreed that the United States might divert on their side water above the falls for power purposes not exceeding in the aggregate a daily diversion at the rate of 20,000 cubic feet of water per second, and that the United Kingdom (by the Dominion of Canada and the Province of Ontario) might do this on their side to an amount not exceeding a daily diversion at the rate of 36,000 cubic feet of water per second.

In 1887 a body called the Commissioners of the Queen Victoria Niagara Falls Park was incorporated by the Ontario statute 50 Vict. c. 13. The Park extended some way above and below the falls on the Canadian side, and it is under the charge of these Commissioners on behalf of the Ontario Government. In 1899 there was passed a provincial Act (62 Vict. c. 11), which by s. 36 empowered the Commissioners to enter into agreements with any persons or companies enabling them to take water from the river for the generation of electricity, and under the powers of this statute the Commissioners, by an agreement dated January 29, 1903, empowered a syndicate to take water from the river sufficient to develop 125,000 electrical horse-power for a term of fifty years from February 1, 1903. By clause 16 of this agreement the Commissioners agreed that they would not themselves engage in making use of the water to generate power. The Syndicate, on March 21, 1903, assigned the benefit of this agreement to the present appellants, the Electrical Development Company, the plaintiffs in the action, and the agreement and assignment were confirmed in 1905 by the Ontario statute 5 Edw. 7, c. 12. The appellants erected works for the supply of electricity, and have supplied power in Ontario and also under a licence from the Dominion Government for the export of electricity, which licence was granted under the Dominion statute 6 & 7 Edw. 7, c. 16.

The Hydro-Electric Power Commission (the second defendant in this action) was established in 1907 by an Ontario statute (6 & 7 Edw. 7, c. 19), which is now embodied in the Revised Statutes of Ontario, 1914. This Commission is a Government department, and s. 23 of the original statute (now s. 16) provides as follows: "Without the consent of the Attorney-General no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office." It is on this section that the Hydro-Electric Power Commission relied on their application to have the writ of summons set aside, no consent to the bringing of the action having been obtained by the appellants from the Attorney-General.

In 1916 there were passed by the Legislature of Ontario two statutes (6 Geo. 5, c. 20 and c. 21). The former of these statutes recited that it was desirable to utilize to the fullest extent the amount of water which might by the treaty of 1909 be diverted from the Niagara River, that the Hydro-Electric Power Commission had reported upon a scheme for its development, and that it was desirable that in the meantime the Commission should procure on the best terms available the additional power wanted. The statute then proceeded to provide that the Government might authorize the Commission to construct and operate works for the diversion of the water and the production of electric power. Sect. 7 is as follows: "The exercise of the powers which may be conferred by or under the authority of this Act, or of any of them, shall not be deemed to be a making use of the waters of the Niagara River to generate electric or pneumatic power within the meaning of any stipulation or condition contained in any agreement entered into by the Commissioners for the Queen Victoria Niagara Falls Park." This section has obviously reference to s. 16 of the agreement of January 29, 1903, already mentioned in this judgment. The other of these two statutes (6 Geo. 5, c. 21) contains provisions of an ancillary nature.

The action was commenced on August 30, 1916, the defendants being the Attorney-General of Ontario and the Hydro-Electric Power Commission, and the following is the endorsement on

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the writ: "The plaintiff's claim is for a declaration: 1. That the defendant the Hydro-Electric Power Commission of Ontario has not the legal right, either with or without the consent or authority of the Lieutenant-Governor in Council, pursuant to the Ontario Niagara Development Act, being the statute 6 Geo. 5, c. 20, or otherwise, to divert water from any part of the Niagara or Welland Rivers for the purpose of developing electrical or pneumatic power, and that the Lieutenant-Governor in Council has no right or legal power, pursuant to the Ontario Niagara Development Act aforesaid, or the Water Powers Regulation Act, 1916, being the statute 6 Geo. 5, c. 21, or otherwise, to make use of the waters of the Niagara River for the production of electric power, or to authorise the defendant the Hydro-Electric Power Commission of Ontario to do so, or to regulate or interrupt the use of such waters by the plaintiff. Or, alternatively, 2. That the covenants contained in paragraphs 16 and 20 of an agreement dated January 29, 1903, between the Commissioners of the Queen Victoria Niagara Falls Park and William Mackenzie, Henry Mill Pellatt and Frederic Nicholls, which said agreement was assigned to the plaintiff on March 21, 1903, enure to the benefit of the plaintiff according to the true, proper and original intent thereof, and that the said covenants are binding on the Commissioners of the Queen Victoria Niagara Falls Park, and on the Lieutenant-Governor in Council, the Ontario Niagara Development Act, being the Statute 6 Geo. 5, c. 20, notwithstanding.

"And the plaintiff further claims an injunction to restrain the defendant the Hydro-Electric Power Commission of Ontario from diverting any water from any part of the Niagara or Welland Rivers for the purpose of developing electric power."

On September 7, 1916, notice was given of a motion on behalf of the Attorney-General that the writ of summons should be set aside as against him, on the grounds that the writ has no statement endorsed thereon of the nature of the claim made against the Attorney-General, and that if the action is brought against the Attorney-General as representing the King, the King can only be proceeded against by petition of

right. On the same day notice was given on behalf of the other defendants, the Hydro-Electric Power Commission, of a motion that the writ of summons should be set aside as against them, on the ground that the consent of the Attorney-General, required by the Power Commission Act (s. 16) to an action being brought against the Commission, had not been first obtained. Orders setting aside the writ were made by the Master upon each motion, and these orders were affirmed by the judge and by the Appellate Division of the Supreme Court of Ontario. The present appeal is brought to have these orders set aside, in order that the action may proceed.

The question raised by this appeal is whether the defendants in the action are entitled to have it summarily stopped upon the grounds stated in the two notices of motion.

The ground and the only ground on which the motion to set aside the writ was made on behalf of the Hydro-Electric Power Commission was that the action had been brought without the consent of the Attorney-General. This appears from the notice of motion in the Court below. And in the respondents' case on the present appeal it is stated that the sole question in issue on the appeal, so far as the Hydro-Electric Power Commission is concerned, is whether the provision that no action shall be brought against the Commission without the consent of the Attorney-General is intra vires of the Ontario Legislature.

The appellants argued that, if this provision on its true construction applied to actions in which the right of the Commission to do the acts complained of is challenged on the ground that they are ultra vires of the Commission, such an enactment would itself be ultra vires of the Provincial Legislature. The appellants contended that it is essential to the working of the constitution of the Dominion under the British North America Act that the provincial Courts should have power in the first instance, and subject, of course, to appeal, to determine whether any particular act which is challenged could be competently authorized by the Ontario Legislature.

The appellants further contended that, properly understood, the section relied on does not apply to an action bringing in question the validity of any proceedings of the Commission as

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ultra vires and beyond the scope of its authority, but only to actions for acts done and omitted to be done in the exercise of the powers entrusted to the Commission.

Their Lordships think it undesirable to express any final opinion upon the construction of this section and its effect upon the present action until the precise nature of the claim of the plaintiffs in the action has been formulated. In their Lordships' opinion it is impossible to treat the appellants' contentions as to the section in question on this point as merely frivolous. They raise points of importance which ought not to be dealt with in this summary fashion, and which demand serious consideration in the ordinary course of law. The action must, therefore, proceed as against the Hydro-Electric Commission, but the present decision will not prejudice the right of the Commission to raise this point as a defence when the pleadings have disclosed the exact nature of the plaintiffs' claim and the facts, so far as necessary, have been ascertained.

In support of the motion to set aside the writ as against the Attorney-General of Ontario it was argued that he ought not to have been joined as a defendant at all, and that any claim against the Crown should have been brought forward by petition of right. It was urged that the decision in *Dyson* v. *Attorney-General* (1) has no application to any case in which relief might be sought by petition of right, and that the declaration asked for by the endorsement on the writ must have been intended merely to lay the foundation for a subsequent petition of right and a claim for damages. Their Lordships' attention was drawn to s. 33 of the Ontario Judicature Act, 1914, c. 56, under which an opportunity may be given to the Attorneys-General for Canada and for the Province to be heard before any decision is given on cases involving constitutional questions. It was pointed out that in proceedings under that section the Attorney-General does not become a party to the action, and it was urged that there was no justification for making him a defendant with the object of binding the Crown by any decision on fact or law which may be arrived at in the action.

The question of the limits within which the decision in *Dyson's Case* (1) is applicable raises points of nicety and some

(1) [1911] 1 K. B. 410.

difficulty for the determination of which it is highly desirable that the Court should have before it a precise statement of the grounds on which a declaration is sought against the Attorney-General. The elaborate argument advanced on behalf of the Attorney-General for Ontario has failed to satisfy their Lordships that it is so clear that no declaration can be made against the Attorney-General under the circumstances of this case as to make it right that the action should be summarily stopped as against the Attorney-General. It will, of course, be open to him to allege as a substantive defence to the action that on the facts there was no justification in point of law for making him a party, but their Lordships do not think that this question ought to be decided until pleadings have been delivered and evidence taken so far as may be necessary. All that their Lordships decide is that the plaintiffs' claim ought not to be disposed of in a summary application such as the present.

The Appellate Division gave judgment for the Attorney-General on the ground that the action did not fall within the authority of *Dyson's Case* (1), but also added some observations to the effect that the claim must fail upon the merits. This point was not properly raised by the notice of motion, and their Lordships do not propose to express any opinion upon it because, whatever difficulties there may be in the way of the ultimate success of the appellants' case, it is not, in the judgment of their Lordships, so clearly bad as to make it right that the appellants should by a summary order be prevented from having it tried in ordinary course.

Their Lordships will humbly recommend to His Majesty that this appeal should be allowed, that the orders of the Courts below should be set aside, and the action remitted to the Supreme Court to be proceeded with in the ordinary way.

There will be no costs of this appeal. The costs in the Courts below of and incident to these motions should be costs in the cause.

Solicitors for appellants: *Charles Russell & Co.*

Solicitors for respondents: *Freshfields & Leese; Blake & Redden.*

(1) [1911] 1 K. B. 410.

[PRIVY COUNCIL.]

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THEODORE AND ANOTHER . . . . . APPELLANTS;

AND

DUNCAN AND ANOTHER . . . . . RESPONDENTS.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (Queensland)—Expropriation—Government Acquisition of Cattle—Power to acquire Cattle of a particular Owner—Discretionary Power of State Executive—Meat Supply for Imperial Uses Act of 1914—*Sugar Acquisition Act of* 1915, *s.* 10.

By the Meat Supply for Imperial Uses Act of 1914 (Queensland), all stock and meat in Queensland was to be held for the disposal of His Majesty's Imperial Government in aid of the supplies for the armies, and upon the making of an order by the Chief Secretary of the State all stock or meat mentioned in the order was to become the property of His Majesty, and every order or direction prejudicial to the Sovereign's title was to be void. By the Sugar Acquisition Act of 1915 (Queensland) a Proclamation which enabled the Queensland Government to acquire the product of the sugar crop of 1915 was ratified, and it was provided that the operation of the Act might be extended by a similar Proclamation, with necessary modifications, to other commodities including live stock. By statute "a Proclamation" was to be read as "a Proclamation or Proclamations." In November, 1915, the operation of the Sugar Acquisition Act was extended by Proclamation so as to authorize the acquisition of cattle, and in June, 1916, a Proclamation declared all the cattle on the respondents' station (and no other cattle) to be vested in His Majesty. The respondents claimed damages for the seizure of their cattle under the Proclamations, which they contended were ultra vires:—

Held, that the Queensland Government was not precluded by the provisions of the Act of 1914 from extending the operation of the Sugar Acquisition Act of 1915 to cattle, and that the Proclamation taking the respondents' cattle was within the discretionary powers of the Government and valid.

Judgment of the High Court of Australia reversed.

APPEAL by special leave from a judgment of the High Court of Australia (August 15, 1917) reversing a judgment of the Supreme Court of Queensland (June 26, 1917).

The respondents brought two actions in the Supreme Court

* *Present*: VISCOUNT HALDANE, VISCOUNT FINLAY, LORD DUNEDIN LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

for a declaration that Proclamations of November 12, 1915, and June 1, 1916, purporting to be made under the Sugar Acquisition Act of 1915 were ultra vires and invalid, and not lawfully made in pursuance of any power conferred by that Act; they also claimed damages for trespass in respect of the seizure of their cattle under the said Proclamations. The defendants in the first action were the Treasurer of the State of Queensland and a constable, and in the second a defendant nominated under the Claims Against Government Act. The actions were consolidated and tried together.

The facts appear from the judgment of their Lordships. Sects. 7 and 10 of the Sugar Acquisition Act of 1915 are set out in the footnote (1); the effect of the other material statutory provisions appear from the judgment.

The consolidated actions were tried by the Chief Justice (Sir Pope Cooper) with a jury. The jury by their verdict awarded the respondents 2900*l.* damages. In answer to a question left to them at the request of the plaintiffs' counsel they found that the Proclamation of June 1, 1916, had not been issued in good faith with the object of safeguarding

(1) Sugar Acquisition Act of 1915, s. 7. "No action, claim, or demand whatsoever shall lie, or be made or allowed by or in favour of any person whomsoever, against His Majesty or the Treasurer, or any officer or person acting in the execution of the Proclamation hereby ratified and confirmed, or any other Proclamation made under this Act, or of this Act, for or in respect of any damage or loss or injury sustained or alleged to be sustained by reason of the making of the said or any such Proclamation or the passing of this Act, or of the operation thereof, or of anything done or purporting to be done thereunder, save only for or in respect of the value as ascertained under this Act of any raw sugar (or other commodity) acquired by His Majesty thereunder." Sect. 10. "The operation of this Act may at any time and from time to time be extended by the Governor in Council, by Proclamation published in the Gazette, so as to authorise the acquisition by His Majesty of raw sugar to be manufactured in any future year, or of any foodstuffs, commodities, goods, chattels, live stock or things whatsoever (in this Act referred to as commodities) in such Proclamation mentioned. Thereupon any such commodity may be acquired by a Proclamation containing provisions similar to those of the Proclamation set forth in the Schedule to this Act, with such modifications as may be deemed necessary, and this Act shall extend and apply to the commodity mentioned in such Proclamation to the same extent and in the same manner as if such commodity were expressly mentioned in this Act."

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the interest of the public, but with an indirect object. The Chief Justice, after hearing arguments, entered judgment for the respondents.

The Full Court (Real, Chubb, and Shand JJ., Lukin J. dissenting) reversed the decision. The majority held that the Proclamation of November 12, 1914, was valid, but that of June 1, 1916, was ultra vires ; they were of opinion, however, that the respondents were protected by s. 7 of the Sugar Acquisition Act of 1915. The appeal is reported at 1917, St. R. Qd. 250.

Upon a further appeal to the High Court of Australia, that Court (Barton, Duffy, and Rich JJ., Isaacs and Powers JJ. dissenting) reversed the judgment of the Full Court, and subject to a reduction of the damages by agreement to 2000*l.* restored the judgment of the trial judge. The majority were of opinion that if a Proclamation extending the Sugar Acquisition Act to a particular commodity was general in form, the Proclamation acquiring the commodity must also be general, and that the second Proclamation was therefore invalid. They also held that the defendants were not protected by s. 7 of the Act. Isaacs and Powers JJ. differed from the majority upon both the above points. All five judges were of opinion that the matter was not affected by the provisions of the Meat Act of 1914. The appeal to the High Court is reported at 23 C. L. R. 510.

1919. March 28, 31 ; April 1. *Sir John Simon K.C.* and *J. T. Ryan* (*Attorney-General for Queensland*) (with them *Micklethwait* and *Giveen*) for the appellants. The respondents' cattle were validly acquired by the Proclamations of November 13, 1915, and June 1, 1916. The power under the second part of s. 10 of the Sugar Acquisition Act was not confined to acquiring the whole of the commodity to which the Act was extended by the Proclamation made under the first part. A contrary view would cause obvious inconvenience in carrying out the purpose of the Act. The Proclamation of June 1, 1916, was similar to the scheduled Proclamation with necessary "modifications." The scheduled

Proclamation did not relate to the whole of the raw sugar in Queensland. Sect. 11 of the Act, which gives power to require persons to disclose how much of any commodity they hold, shows that the acquisition of so much of a commodity as was in the hands of a particular owner was intended to be authorized. In any case the appellants are protected by s. 7, which applies wherever a defendant has a bona fide belief that he is acting under the statute or a Proclamation: *Greenway* v. *Hurd* (1), *Selmes* v. *Judge* (2), *Bradford Corporation* v. *Myers*. (3) The words restricting an owner's rights to a recovery of the "price ascertained under the Act" raise no difficulty; the Government could not deny the validity of a Proclamation which they had made. The provisions of the Meat Act of 1914 did not preclude the extension of the Sugar Acquisition Act to cattle, since the former Act did not divest the property in any cattle. The Proclamations by which the respondents' cattle were taken were not in conflict with any right conferred on the Imperial Government by the Meat Act. That Act was to be administered by the Queensland Government; the extension of the Sugar Act to cattle was within the discretionary power of the local Executive. Even if it was not, s. 7 of the Act of 1915 gives a complete defence in these actions. In any view the Meat Act applies only to the 600 fat cattle.

Upjohn K.C., *Hon. F. Russell K.C.*, and *Hon. M. Macnaghten* for the respondents. The Meat Act of 1914 by s. 6, sub-s. 1, gave the Imperial Government rights, in the nature of a charge, over all stock (defined to include cattle) in Queensland; by s. 7 all dealing with them was prohibited and any future order prejudicial to the arrangement was declared void. The Queensland Government therefore had no power to extend the Sugar Acquisition Act to cattle, the Crown not being expressly referred to in that Act. If the incompetence existed only as to 600 of the cattle taken, that is sufficient to invalidate what was done. Further, on the true construction

(1) (1792) 4 T. R. 553. (2) (1871) L. R. 6 Q. B. 724.
(3) [1916] 1 A. C. 242, 264.

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of s. 10 of that Act the Proclamation of June 1, 1916, was ultra vires. The Act gives power to take the property of a subject at a price to be fixed by the Government; it should therefore be construed strictly. The words "any such commodity" in the second part of s. 10 can only mean the whole commodity the acquisition of which has been authorized. The scheduled Proclamation applies to a complete class of a commodity throughout Queensland, namely the sugar crop of 1915. To take only so much of a commodity as was held by a particular owner was not a "modification," but a difference in principle. The Act expressly provides that it is to deal with a "shortage," and that the price was to be fixed by Proclamation; both those provisions are inconsistent with the acquisition of the property of a particular individual. The appellants are not protected by s. 7 of the Sugar Act of 1915, since the Proclamation of June 1, 1916, was invalid. The section relieves a defendant when he has acted in a bona fide belief that certain facts exist which would have justified him, but not when he has acted upon a wrong view of the effect of a statute. That view is not in conflict with *Selmes* v. *Judge* (1) and is supported by *Roberts* v. *Orchard* (2) and *Hazelton* v. *Potter*. (3) As a matter of construction s. 7 applies only when the Proclamation acted upon was an effective acquisition, and in favour of a person acting under a valid Proclamation. The result of a contrary view is that a person whose property has been taken under an invalid Proclamation has no remedy, since the only right is to receive the value "as ascertained under the Act," namely the price fixed by the invalid Proclamation. By the terms of s. 10 the power of extension thereby given can be exercised only in the interests of the public. The jury found that the Proclamation of June 1, 1916, was not made as a bona fide exercise of the power, or in the interest of the public. It was really made in order to prevent the respondent from moving her cattle into South Australia; when it was made the Government had no right to prohibit her from doing so. [Reference was made

(1) L. R. 6 Q. B. 724. (2) (1863) 2 H. & C. 769.
(3) (1907) 5 C. L. R. 445.

to *Foggitt, Jones & Co.* v. *State of New South Wales* (1), and *Duncan* v. *State of Queensland.* (2)]

Sir John Simon K.C. in reply. Sect. 7 of the Act of 1915 is a defence when there has been an honest belief in the regularity of the proceedings: *Hermann* v. *Seneschal* (3), *Roberts* v. *Orchard* (4), *Spooner* v. *Juddow.* (5) The question whether there had been a valid acquiring Proclamation under the authorizing Proclamation was one of fact. There was no evidence that the Government acted in bad faith; Isaacs and Powers JJ. expressly so held, and no judge expressed a contrary view. But in any case the discretion of the Executive in exercising the powers confided to it by the Legislature cannot be questioned: *Lipton* v. *Ford* (6), *The Zamora* (7), *Rex* v. *Halliday* (8), *Wijesekera* v. *Festing.* (9)

[VISCOUNT HALDANE. Does the constitution of Queensland include as part of the practice of its parliament the power to impeach Ministers?

The authorities show that it does not: *Kielley* v. *Carson* (10), *Fenton* v. *Hampton* (11), *Barton* v. *Taylor* (12), and Keith's Responsible Government in the Dominions, vol. I., p. 446.]

May 2. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The questions for decision on these appeals are of public interest. They relate to the interpretation of legislation of the State of Queensland, passed for war purposes, and to the action of the executive government under the statutes so passed.

The respondents, who were plaintiffs in the Court of first instance, claimed damages for trespass and detinue by reason of the enforcement of certain Proclamations (dated November 12, 1915, and June 1, 1916) alleged to have been unlawful. The actions were tried before the Chief Justice of Queensland

(1) (1916) 21 C. L. R. 357.
(2) (1916) 22 C. L. R. 556.
(3) (1862) 13 C. B. (N. S.) 392.
(4) (1863) 2 H. & C. 769.
(5) (1850) 6 Moo. P. C. 257, 283.
(6) [1917] 2 K. B. 647.
(7) [1916] 2 A. C. 77, 106, 107.
(8) [1917] A. C. 260, 268, 270.
(9) Ante, p. 646.
(10) (1842) 4 Moo. P. C. 63.
(11) (1858) 11 Moo. P. C. 347.
(12) (1886) 11 App. Cas. 197.

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and a jury. The plaintiffs obtained a verdict and judgment for 2900*l.*, afterwards by agreement reduced to 2000*l.* The defendants appealed to the Full Court of Queensland, which set aside the judgment at the trial and entered judgment for the defendants. The plaintiffs then appealed to the High Court of Australia, and that Court by a majority reversed the judgment of the Full Court of Queensland, and directed judgment to be entered for the plaintiffs, the present respondents, for the agreed amount of damage.

In order to make plain the nature of the questions which have arisen, questions about which there has been great divergence of judicial opinion in the Courts below, it will be convenient in the first place to refer to the origin and character of the legislation under which the Proclamations referred to were made. On August 12, 1914, almost immediately after the declaration of war, the Parliament of Queensland passed an emergency Act, known as the Meat Supply for Imperial Uses Act of 1914. That statute was, by s. 1, to remain in force during such period or extended period as the Governor in Council should by Proclamation declare, and it was, by s. 5, to be administered by the Chief Secretary of the State. Sect. 6 declared that all stock and all meat in any place in Queensland were to be subject to the Act, and to be held for the purposes of and to be kept for the disposal of His Majesty's Imperial Government in aid of the supplies for his Armies in the war. By sub-s. 2 of s. 6, upon the making of an Order in writing under the hand of the Chief Secretary or his Under-Secretary, all stock and meat mentioned in such Order were to cease to be the property of the then owners and become the absolute property of His Majesty, free from any other title. Peaceable possession was to be given to His Majesty and the title of the owners was to be changed into a right to receive payment of the value of what was taken under the Act. By s. 7, sub-s. 2, every authority, order or direction prejudicial to the Sovereign's title, and given or made before or after the Act, was declared void, a Board of Control was to be appointed to fix the prices payable in respect of appropriations by the Chief Secretary.

By a subsequent Act, called the Sugar Acquisition Act of 1915, provision was made for validating and giving statutory effect to a certain Proclamation which had been made previously to the passing of this Act on June 30, 1915. The provisions of this Proclamation are similar to those of one of the Proclamations in question, both of which were made under the Sugar Acquisition Act of 1915. For that Act, as will be seen, contained a section enabling its operation to be extended to live stock, in relation to which the present litigation has arisen.

By the Sugar Acquisition Act it was provided that the statute should have effect, notwithstanding anything to the contrary, whether express or implied, in any other statute or document. By s. 5 a Proclamation of June 30, 1915, which enabled the raw sugar in Queensland, the product of the crop of 1915, to be taken by the Government of the State, was ratified, and was to be read as one with the Act. By s. 7 no action or claim was to lie against His Majesty, or the Treasurer of the State (who, under s. 4, was to administer the Act), or any officer or person acting in execution of the Proclamation ratified or any other Proclamation under the Act, for or in respect of any damage or loss or injury sustained by reason of the Act or any such Proclamation or anything done thereunder, save only the value of the sugar acquired. By s. 10 the Governor in Council might extend the operation of the Act by Proclamation, so as to authorize the acquisition of other commodities to be mentioned in such a Proclamation, including inter alia, live stock. Thereupon such commodities might be acquired by a Proclamation containing provisions similar to those of that scheduled, with such modifications as might be deemed necessary, and the Act was to extend and apply to such a commodity to the same extent and in the same manner as if it were expressly mentioned in the Act. By s. 11 such a Proclamation might order, either in general terms or by particular order directed to any person or class of persons, returns with respect to such a commodity. The statute further provided that the Governor in Council might make and publish from time to time all Proclamations required

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for giving effect to it, and every Proclamation made under the Act was to be read as one with the Act and as of equal validity with it.

On November 12, 1915, a Proclamation was duly made and published extending "the operation of the Sugar Acquisition Act of 1915, so as to authorise the acquisition by His Majesty of cattle now or hereafter to come within Queensland."

On June 1, 1916, a Proclamation was duly made and published by which, on the recital that, by reason of the continued existence of the war and the expected shortage in the supply of live stock, it had become necessary to take such action as appeared to be most conducive towards safeguarding the interests of the public, the Governor in Council declared that all the cattle then on Mooraberrie station (the property of the respondents), to the number of seventeen hundred cattle, including six hundred fat bullocks, were to be held for the purposes and at the disposal of His Majesty's Government of the State of Queensland, the title to be vested free from incumbrances in such Government, and that of the owners to be changed into a right to receive payment of the value of the cattle; peaceable possession thereof to be given to the Treasurer or to any person authorized by him to take possession. Every existing order or direction, express or implied, which might interfere with this right of His Majesty was to be of no effect. This Proclamation followed the form of that already referred to relating to sugar and scheduled to the Act, excepting that it was applied to cattle and to the specific cattle of the owners of a particular station. There were other Proclamations of the same kind, also dealing with specific cases.

On June 3, 1916, the appellant Theodore, acting on behalf of the Queensland Government, instructed the appellant Balfour to take possession of the cattle at Mooraberrie, referred to in the Proclamation. Balfour proceeded to the station to do so and entered, but the appellant Duncan refused to muster the cattle as requested by him. About July 27 Balfour withdrew, the six hundred fat cattle having been handed over

to the Government under an agreement between the Government and the respondents, a price which had been settled having been paid for them.

On December 19, 1916, one of the writs in the present action was issued against Theodore and Balfour claiming damages for trespass and detinue by reason of Balfour's entry and action, which were alleged to be illegal. On January 18, 1917, a second action was commenced against the appellant Beal who was the proper person to be sued, under the Queensland Claims against Government Act of 1866, as representing the Queensland Government, claiming a declaration that the Proclamations of November 12, 1915, and June 1, 1916, were ultra vires and invalid and damages for the consequent trespass and detinue. By virtue of this Act the Crown can be used in Queensland for tort. An Order was made by the Supreme Court consolidating these actions, and they were tried and disposed of as already stated.

Several questions have been argued before their Lordships. One of these was whether, so long as the Meat Act remained operative, a valid Proclamation for the acquisition of stock within the meaning of that Act could be made by the Queensland Government under the Sugar Act. It was contended for the respondents that the second Proclamation could not render lawful the direction to Balfour to enter in order to take possession of the seventeen hundred cattle on the station. It was said that under the terms of the Meat Act all stock in Queensland (which included, by definition, cattle intended for export, and therefore the six hundred fat bullocks) was expressly put at the disposal of His Majesty's Imperial Government in aid of the supplies for his armies in the field in the war, and that although the Sugar Acquisition Act, by s. 2, was to have effect, notwithstanding anything to the contrary express or implied, in any other Act, its provisions, which were couched only in general terms without express reference to the Crown, could not be construed as trenching on any proprietary or prerogative interest conferred on the Crown by the Meat Act. Upon this argument their Lordships have to observe that even if the well known maxim of

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construction can be treated as applying as between two statutes passed by the same Parliament and relating only to the duties of the Minister of the Crown responsible to that Parliament in matters of administration, it does not assist the respondents. For it cannot be assumed that the Queensland Ministry would have acted in any fashion inconsistent with such duty as they had been entrusted with by the representative of the Sovereign. The Sugar Acquisition Act and the Proclamation under it in regard to live stock merely provide for enabling such action to be taken "as appears to be most conducive towards safeguarding of the interests of the public." It is quite consistent with the provisions introduced for this purpose that the Queensland Government should put the stock to be thus acquired at the disposal of the Imperial Government for the use of the armies. The Crown is one and indivisible throughout the Empire, and it acts in self-governing States on the initiative and advice of its own Ministers in these States. The question is one not of property or of prerogative in the sense of the word in which it signifies the power of the Crown apart from statutory authority, but is one of Ministerial administration, and this is confided to the discretion in the present instance of the same set of Ministers under both Acts. With the exercise of that discretion no Court of law can interfere so long as no provision enacted by the Legislature is infringed. The Ministers are responsible for the exercise of their functions to the Crown and to Parliament only, and cannot be controlled by any outside authority, so long as they do nothing that is illegal. Their Lordships are of opinion, not only that the Proclamation in question was within the statutory powers of the Government, but that it rested within the discretion of Ministers whether, and to what extent, it should be applied to any particular matter falling within its scope.

It was said, however, that the Proclamation relating to Mooraberrie Station was ultra vires for another reason. It was argued on the construction of the Sugar Acquisition Act that whether or not the preliminary Proclamation, required for the extension to other commodities of that Act,

need apply to the whole of the commodity in Queensland, the second Proclamation, relating to its acquisition, must extend equally far to the full extent of the field covered by the preliminary Proclamation, and could be of no effect unless it covered the same field, and that it was therefore unlawful to issue under s. 10 a Proclamation relating only to the live stock on a particular station, because this was less than the whole of the cattle then or thereafter to come within the State, to all of which the extension Proclamation extended, and imported discrimination of an unjustifiable kind. But the answer of the Queensland Government was that when a commodity had once been brought by an extension Proclamation within the Act, that Government could at any time determine, according to circumstances, how much if any, of that commodity was required in the public interest. This appears to be prima facie a reasonable construction, for it avoids the result of the other view, under which the State might find itself compelled to take far more than it actually required. Moreover, it is at least in harmony with what is indicated by the language used in the statute. For the expression "a Proclamation" in the second paragraph of s. 10 includes "or Proclamations," by virtue of s. 11 of the Queensland Acts Shortening Act of 1867, if, as here, the contrary is not provided. Such an interpretation, moreover, harmonizes with the other provisions of the Sugar Act. For by s. 11 of that Act any Proclamation may direct returns to be made either by Order of a general nature, or by Order directed to any one person or class of persons. Again, not only is the Proclamation scheduled applied, not to all the sugar in the State, but only to such as is the product of the 1915 crop, but, by s. 10, the similar Proclamation as to further commodities which is to follow on an extension Proclamation may contain "such modifications" as may seem necessary, words which, as their Lordships think, indicate that it may be confined to any particular portion that is required of what the extension covers. Their Lordships are in agreement with the view of the Act taken as the conclusion of the powerful reasoning of Isaacs and Powers JJ. The first Proclamation

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merely confers a power to acquire a commodity, and this may, by subsequent Proclamations, be exercised from time to time over the whole of the commodity or any part or parts of it. As these learned judges say, the fullest discretion is given as to the way in which the powers of proclamation are to be exercised, and times and quantities are to be chosen by those having the administration of the Act.

These considerations are sufficient for the decision of the crucial question on the appeals, and they render it unnecessary to enter on another point taken on behalf of the appellants, that even if they are wrong in their contention as to the validity of the Proclamation, s. 7, already referred to, of the Sugar Acquisition Act, which excludes any action or claim for injury sustained by reason of any Proclamation or anything done under the Act, is fatal to these actions.

Their Lordships will humbly advise His Majesty that the judgment of the High Court of Australia should be reversed and that of the Supreme Court of Queensland restored. Of the appeals to the High Court the present respondents must pay the costs. As to the appeals to the Sovereign in Council, their Lordships think that, having regard to the character of the question at issue, and to the discretion which was reserved when special leave to appeal was granted, the case is not one in which any order as to costs should be made.

Solicitors for appellants: *Freshfields & Leese.*
Solicitors for respondents: *Dawes & Sons.*

[PRIVY COUNCIL.]

LENNON . . . . . APPELLANT;

AND

GIBSON AND HOWES, LIMITED . . . RESPONDENTS.

J. C.*
1919
May 2.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (Queensland)—Sugar-Cane Prices Fund—Assessment—Sugar-Cane grown by Millowner—"Received at a Mill"—Construction of Statute—Same Words in former Statute—Regulation of Sugar-Cane Prices Act of 1915 (6 *Geo.* 5, *No.* 5), *s.* 20, *sub-s.* 3.

The "sugar-cane received at a mill" in respect of which a millowner is liable to pay an assessment under s. 20 of the Regulation of Sugar Prices Act of 1915 (Queensland) includes sugar-cane which the millowner has himself grown and has sent to his mill for treatment.

When a Legislature has used the same words in a similar connection in two statutes it may be presumed in the absence of any context indicating a contrary intention, that the same meaning attaches to the words in the latter as in the former statute.

Judgment of the High Court of Australia reversed.

APPEAL by special leave from a judgment of the High Court of Australia (December 20, 1917), reversing a judgment of the Supreme Court of Queensland (October 9, 1917).

The question for determination was whether the respondents, the owners of a sugar mill in Queensland, were liable under s. 20, sub-s. 3, of the Regulation of Sugar Cane Prices Act of 1915 (Queensland), to pay an assessment made upon them under that section, so far as it was in respect of sugar-cane which they had themselves grown.

The facts and the terms of s. 20 and of the other relevant provisions of the Act appear from the judgment of their Lordships.

Upon a case stated by consent, the Full Court of Queensland held that the respondents were liable; the proceedings are reported at 1918 St. R. Qd. 1.

The High Court of Australia (Barton, Isaacs and Rich JJ.)

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, LORD DUNEDIN, and LORD SHAW OF DUNFERMLINE.

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reversed the decision of the Full Court upon an appeal reported at 24 C. L. R. 140.

1919. April 4, 7. *Sir John Simon K.C., J. T. Ryan* (*Attorney-General for Queensland*) and *Micklethwait* for the appellant. The words "sugar received at a mill" in s. 20, sub-s. 3, according to their ordinary meaning, include sugar-cane grown by a millowner and treated at his mill. The ordinary meaning of the words is not affected by the definition of "cane-grower" in s. 3. If the respondents' contention is right nobody would be liable to pay the assessment upon sugar-cane bought by a millowner from another millowner who has grown it. The Act is for the benefit of the whole industry, there is no reason why a millowner so far as he is also a grower should not be liable. The words are "received at a mill" not "received by a millowner," and any expression which would connote a purchase and sale is avoided, although "sold and supplied" is used elsewhere in the Act.

Hon. F. Russell K.C. and *Harman* for the respondents. The sub-section is of the nature of a taxing enactment and should be construed in favour of the respondents. The word "received" cannot be given the wide meaning contended for. The second part of the sub-section shows that the assessment is only payable upon sugar-cane supplied by a sugar grower, and the definition of sugar grower in s. 3 excludes a millowner. The Act has no relation to sugar-cane grown by a millowner. The definition of "mill" includes only mills to which sugar-cane is sold and supplied, consequently if a millowner grows all the cane which he treats he cannot be subject to any assessment. If however he buys all the cane which he treats he passes the whole liability over to the grower. It is not reasonable to construe the Act so that if he grows some and buys some of the cane treated, he is to be liable.

Sir John Simon K.C. in reply. The definition of "sugar-cane received" in the Sugar Experiment Stations Act of 1900 includes sugar grown by a millowner. That expression should be presumed to be used in the same sense in the Act now under discussion.

May 2. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment of the High Court of Australia, dated December 20, 1917, upon a special case stated by consent of parties. The judgment of the Full Court of Queensland was pronounced in favour of the appellant on October 9, 1917, but was reversed by the High Court.

As appearing from the special case the facts are simple. The appellant is the Minister of the Crown charged with the administration of the Regulation of Sugar Cane Prices Act of 1915. The respondents, a joint stock company, carry on in Queensland the business of millowners, manufacturers and refiners of sugar. About half of their sugar is produced from cane of their own growing, the other half from cane bought from other growers. The total quantity of sugar-cane treated and manufactured at the respondents' mill during the 1916 season was 42,470 tons. Of this, 21,193 tons consisted of cane grown by themselves and 21,277 tons of cane grown by others. The respondents refused to pay the sum sued for, namely, 176*l.* 12*s.* 2*d.*, being the levy of an assessment of 2*d.* per ton on the former figure, namely, the cane grown by themselves. Hence the writ and the special case.

The question is whether this refusal was justified. In other words are the respondents liable under the Act for an assessment in respect of sugar-cane received at their mill although grown by themselves on lands belonging to them? There is no dispute as to rate or amount.

It is of interest to observe that the Act of 1915, which is to be under construction, was preceded in Queensland by an Act to provide for the establishment and control of sugar experiment stations, and that the expenses of that Act were provided for by the levy of an assessment "not exceeding one penny on every ton of sugar-cane received at a sugar works." By the definition of that Act "sugar-cane received" was to have the meaning of "sugar-cane delivered at a sugar works and accepted." In the absence of any context indicating a contrary intention, it may be presumed that the Legislature intended to attach the same meaning to the

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same words when used in a subsequent statute in a similar connection.

The conflict of opinion between the Courts below has arisen upon the construction of s. 20 of the Act of 1915. By sub-s. 3 thereof it is provided: "The Central Board may make and levy an assessment of one penny on every ton of sugar-cane received at a mill, or such other sum per ton as the Governor in Council may at any time fix by Order in Council. Such assessment shall be paid by the owner of the mill to the Minister, on the first day of every month, upon the actual number of tons of sugar-cane received at the mill during the preceding month."

This is the first half of the sub-section, and did it stand by itself there would appear to be no possibility of doubt that the levy of the assessment was to be made upon every ton of sugar-cane received at the mill; or, more emphatically, upon "the actual number of tons of sugar-cane received at the mill." The cane in question in this suit was actually received at the mill, and so far the language of the statute applies expressly to it. But the argument for the respondents, which was very powerfully presented, arose more definitely on the second half of the sub-section. It is in these terms: "Such assessment shall, however, be borne by the cane-grower for every ton so supplied by such cane-grower. The amount of the assessment shall be a debt due from the owner of the mill to the Central Board and recoverable at the suit of the Minister accordingly, but the owner of the mill may deduct from the price of the sugar-cane each cane-grower's proportion of such assessment. All assessments levied under this Act shall be paid into the fund."

It is no doubt true that the right of the appellant to recover is dependent upon the first half of the section, under which the liability of the millowner is fairly plain, and that the second half of the section deals, and deals solely, with such relief as the statute grants to the millowner from the cane-grower. This might be a sufficient answer to the defence set up. But in view of the argument presented, their Lordships do not desire to put their judgment upon this

narrow ground. The scheme of the sub-section seems very reasonably to be worked out by the consideration that the levy that is to be made upon the millowner shall be in respect of all the tonnage of sugar received at the mill, the millowner to have the right to be recouped in respect of all tonnage supplied by a cane-grower. If the cane-grower is an outsider the case is provided for. That grower recoups the millowner. If the cane-grower is the millowner himself, the millowner cane-grower bears the levy, and the recoupment is effected, no doubt, in the ordinary commercial sense, by a cross-entry in the firm's books. In the result a levy is made upon the actual tonnage received at the mill, and the statute is satisfied. To permit the millowner to exclude the proportion which is grown on lands belonging to him would, in their Lordships' opinion, be to violate the express words of the statute, which provide for the levy being upon the tonnage which the mill actually receives.

But helpful light is thrown upon the question by the connection and context in which the words in sub-s. 3 are used, and in particular by a consideration of sub-s. 1 of the same section, namely, s. 20. It is in these terms: "(1.) There shall be established a fund to be called 'The Sugar-Cane Prices Fund,' out of which shall be paid all expenses incurred by the Governor in Council or the Minister or the Central Board or any Local Board in the execution of this Act."

In their Lordships' opinion it is a mistake to think that the expenses in respect of which the levy was made are not in the interests of Queensland and its sugar trade, and its public as a whole. The expenses are to be those incurred, by the Governor-General, the Minister, the Central Board, or a Local Board. To take one example: What are the powers of the Governor-General on this head of expenses? By s. 4, sub-s. 5: "The Governor in Council may appoint a secretary of the Central Board and such chemists, inspectors, and other officers as may be deemed necessary for the purposes of this Act.' The analysts are important officers by reason of the fact that "commercial cane sugar" depends, under

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the definition in the statute, on "the estimated value of sugar-cane based upon analysis of its juice." And in point of fact it turns out, as might have been expected, that a main portion of the expenses of working the Act is the furnishing of analysts and an inspectorate. This is merely an illustration of the general nature of the statute, because it is at least unlikely that expenses of that character directed to the protection and advance of the sugar industry as a whole should be recovered only by a levy upon cane grown by one person and sold or delivered for crushing to another. So far, however, was the contrary argument pushed that it was contended that once a cane-grower starts a crushing-mill he thereby escapes the incidence of the levy. Their Lordships would be loth to arrive at any such conclusion.

The difficulty arises from the definition clause, which provides that in the Act, "unless the context otherwise indicates," certain terms are to have "the meanings respectively set out against them." Then occur the following, namely: "'Cane-grower.'—Any person, company, corporation, firm, or association, growing, selling, and supplying sugar-cane to a sugar-mill for the purpose of its being treated and manufactured into sugar; the term (except for the purpose of being bound by an award) does not include any owner of a mill growing sugar-cane and supplying the same to such mill, or selling and supplying the same to any other mill." And "'Sugar-mill,' 'Mill.'—A sugar-mill to which sugar-cane is sold and supplied for the purpose of being treated and manufactured into sugar."

It appears plain to their Lordships that these meanings are to be so given only where the context so permits, and that in s. 20, sub-s. 3, the context, as already observed, and in particular sub-s. 3, prevent the attachment of a non-natural or artificially limited meaning to very plain and general words. Upon a review of the statute, however, as a whole, it is found that the necessity for putting cane-growers into one category separate from millowners was principally this: that in the constitution of this Central Board it was provided that there should be a cane-growers' representative and a

millowners' representative. These interests thus separately represented were, to avoid a cross-division, kept separate in the definition. This is a simple and perfectly workable explanation of what no doubt might have been more clearly expressed in the statute itself.

Further, there is an exception applicable to the term "cane-grower" expressed in these words: "except for the purpose of beng bound by an award." When the sections of the Act are looked at, this is an exception of very wide dimensions. But in their Lordships' opinion the definition is also entirely inapplicable to s. 20, which is dealing, not with the rival interests of cane-grower and millowner, but with the promotion of the sugar industry as a whole. It would not accordingly be legitimate to apply the very clear general language of s. 20 so as to produce the result in construction that a mill which in fact crushes sugar, is yet neither a mill nor a sugar-mill, because it does not take in goods on a contract of sale, nor to apply the term "cane-grower" in the sense that a cane-grower may grow cane, but he is not a cane-grower because he crushes his sugar-cane at his own mill. These constructions appear to their Lordships false and inapplicable. In short, the main proposition on which the judgment of the High Court is founded, namely, that the word "received" is equivalent to "sold and taken delivery of at the mill," is one to which their Lordships do not see their way to assent.

In the opinion of their Lordships, the institution of Sugar Boards with their powers is, as said, for the benefit of the sugar-growing community and the public generally. The adjustment of prices and the making of awards thereon are leading, but are not the only, purposes of the statute. The scheme of the Act is that the industry should bear the expense of working the scheme. There is no prima facie reason why a sugar-grower who is a millowner should be treated differently in this matter from a sugar-grower who is not. The collection of the tax, for obvious reasons of convenience, is made at the mill. Accordingly, when a tax is imposed on the actual number of tons of sugar-cane received at the mill, there is

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every reason for holding that the term should be interpreted according to its natural meaning; that is, by making the criterion receipt without consideration of the quarter from which the sugar can come.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Supreme Court of Queensland restored, that the appellant should have his costs in the Supreme Court of Queensland and in the High Court of Australia, and that there should be no costs of this appeal.

Solicitors for appellant: *Freshfields & Leese.*

Solicitors for respondents: *Blyth, Dutton, Hartley and Blyth.*

[HOUSE OF LORDS.]

HARRIES . . . . . APPELLANT;

AND

CRAWFURD AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)*
1919
May 23.

Education—Non-provided School—Dismissal of Headmaster—"Grounds connected with the giving of Religious Instruction in the School"—Consent of Local Education Authority—Irregularity in Appointment of School Managers—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-s.* 1, *s.* 11; *Sched. I., Part B, cl.* 3.

The plaintiff was headmaster of a non-provided school under an agreement terminable by three months' notice in writing on either side. In 1917 an assistant diocesan inspector held a voluntary examination of the children at the school in religious knowledge, and issued an adverse report of the result of the examination. The plaintiff wrote an improper letter to the assistant diocesan inspector, protesting against the report as unfair, and, upon his refusal to withdraw the letter, the defendants, the managers, suspended him for insubordination and, after receiving an intimation from the local education authority that their consent was not necessary to dismissal on grounds connected with the giving of religious instruction at the school, gave the plaintiff three months' notice in writing terminating the agreement. The plaintiff claimed an injunction restraining the defendants from acting on the notice of dismissal:—

Held, on the facts, that the dismissal was on grounds connected with the giving of religious instruction in the school within the meaning of s. 7, sub-s. 1 (*c*), of the Education Act, 1902, and therefore the consent of the local education authority was not required.

Of the six defendants, two had been duly appointed managers, one by the local education authority, the other by the parish council, while the third, as vicar of the parish, was an ex-officio foundation manager. The remaining three had not been elected triennially by the subscribers to the school as provided by an Order of the Board of Education, but had been irregularly elected either by the parishioners at a general meeting or by co-option.

Held, that by virtue of the provisions of cl. 3, Part B, of the First Schedule to the Education Act, 1902, the proceedings of the defendants were not invalidated by the defect in the election or appointment of three of their number.

Decision of the Court of Appeal [1918] 2 Ch. 158 affirmed.

APPEAL from a decision of the Court of Appeal affirming a decision of Peterson J. (1)

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD ATKINSON, and LORD WRENBURY.

(1) [1918] 2 Ch. 158.

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The facts, which were not in dispute, are fully stated in the report of the case before Peterson J. and the Court of Appeal, and they appear sufficiently from the judgment of the Lord Chancellor.

The action was brought by the appellant, the headmaster of the Sonning public elementary (non-provided) school, against the respondents, the managers, for an injunction to restrain them from acting upon a notice of dismissal of the appellant from his office of headmaster until his engagement had been lawfully determined, and until the consent of the county education authority had been obtained thereto.

The questions raised by the appeal were :—

(1.) Whether in the circumstances the dismissal of the appellant was on grounds connected with the giving of religious instruction in the school within s. 7 (1.) (*c*) of the Education Act, 1902, in which case the consent of the local education authority to his dismissal was not required.

(2.) If not, whether the consent of that authority was, as between the respondents as the managers and the appellant, a condition precedent to his dismissal.

(3.) Whether the notice of dismissal was invalidated by certain irregularities in the appointment of some of the managers.

Peterson J., without expressing any opinion on the first question, answered the second question in the negative, and held, following *Young* v. *Cuthbert* (1) in preference to *Smith* v. *Macnally* (2), that the Act did not entitle the teacher to assert the want of consent of the education authority as a bar to his dismissal. The Court of Appeal (Swinfen Eady M.R., and Warrington and Duke L.JJ.) answered the first question in the affirmative and expressed no opinion on the second question. Both Courts answered the third question in the negative.

The questions whether the consent of the local education authority to the appellant's dismissal was required, and whether it was competent to the appellant to complain of the absence of that consent were first argued.

(1) [1906] 1 Ch. 451. (2) [1912] 1 Ch. 816.

May 20, 22, 23, 1919. *Maugham K.C.* and *Arthur A. Thomas* (with them *F. K. Archer*) for the appellant.

The appellant was dismissed for insubordination, and not on grounds connected with the giving of religious instruction, and therefore the consent of the local educational authority to his dismissal was required: Education Act, 1902, s. 7, sub.-s. 1 (*c*). Peterson J., assuming that the dismissal was not on grounds connected with the giving of religious instruction, held, following *Young* v. *Cuthbert* (1) and dissenting from *Smith* v. *Macnally* (2), that s. 7, sub-s. 1, of the Education Act merely regulated the relations between the managers of the school and the education authority, and that the appellant was not entitled to avail himself of the want of consent of the local education authority. The Court of Appeal proceeded on the view that the dismissal was on grounds connected with the giving of religious instruction and refrained from expressing any opinion upon the point decided by Peterson J.

[Counsel then contended that it was open to the appellant to take the objection that the consent of the local education authority had not been obtained, but, having regard to the view of the case taken by the House, it is unnecessary to report their arguments on this point.]

Tomlin K.C. and *Sheldon* for the respondents. The interference by the teacher with the diocesan inspector was something which touched the efficiency of the system of religious teaching at the school by making it difficult or impossible to send inspectors to report on the religious instruction given at the school so long as that particular teacher remained, with the result that the test of the efficiency of the instruction would be gone. The appellant's letter directly affects the system under which religious instruction is given and, that being so, it is no answer to say that the appellant was dismissed for insubordination; one must examine what is the real nature of the offence.

The scheme of the Act is to interfere with the non-provided schools only so far as is necessary to enable the education authority, who were not concerned with religious education,

(1) [1906] 1 Ch. 451. (2) [1912] 1 Ch. 816.

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to carry out the powers entrusted to them by the Act: *Gillow* v. *Durham County Council:* (1)

Subject to the restrictions imposed by s. 7, the teachers remain the servants of the managers, and the power of dismissal, though expressly recognized by the Act, does not rest on statute, but is the result of the contractual relation between them: *Crocker* v. *Plymouth Corporation.* (2)

The language of the exception as to consent in sub-s. 1 (*c*) of s. 7 is intentionally wide, and the local educational authority themselves took the view that this was a dismissal on grounds connected with the giving of religious instruction, and that their consent was not required.

[They also contended that s. 7, sub-s. 1, was intended merely to regulate the relations between the local education authority and the managers and did not purport to confer any substantive right upon the teachers, and that consequently the appellant could not avail himself of any want of consent on the part of the local education authority.]

Maugham K.C. in reply. It is conceded that the circumstances of the offence were such that the dismissal might have proceeded on a ground connected with the giving of religious instruction, but on the facts that was not the ground of dismissal. The managers elected to treat the letter as merely a piece of insolence from a teacher to an inspector, irrespective of whether he was a diocesan inspector or not, and upon a general act of insubordination, which was the sole point considered, the local education authority are as well qualified to express an opinion as anybody else.

[In the course of the arguments *Mitchell* v. *East Sussex County Council* (3) and *Blencowe* v *Northamptonshire County Council* (4) were also referred to.]

The question whether the irregularity in the selection of the respondents invalidated the dismissal was then argued.

Maugham K.C. and *Arthur A. Thomas* (with them *F. K. Archer*) for the appellant. In 1903, when the Act became operative in Berkshire, there being no managers who fulfilled

(1) [1913] A. C. 54, 63.
(2) [1906] 1 K. B. 494, 501.
(3) (1913) 109 L. T. 778.
(4) [1907] 1 Ch. 504.

the conditions of the Act, it became necessary to appoint managers under s. 11 and the First Schedule, Head B, of the Act and the Final Order of the Board of Education dated September 27, 1903. As regards the three representative managers, from first to last no regard was paid to any one of the provisions of that Order, and they were not duly elected. Then the question is whether the respondents can rely on clause 3 of Part B of the First Schedule to the Act. Clause 3 and clause 11 must be read together, and so read, the appellant's submission is that clause 3 was not intended to exonerate persons from observing the requirements of the Act. Clause 3 says that the proceedings of a body of managers shall not be invalidated by any defect in the election, appointment or qualification of any manager. Clause 11 says: "Until the contrary is proved, a body of managers shall be deemed to be duly constituted and to have power to deal with the matters referred to in their minutes." Clause 11 was intended to allow the appellant to show that the body of managers was nor duly constituted, and clause 3 must be reconciled with that clause if possible. Clause 3 was not intended to allow a body of strangers to exercise the powers of the Act; it was intended to cure minor and not radical effects, as, for example, where a notice was not sent to certain qualified subscribers, or was sent to some persons who were not qualified subscribers. But here no meeting of qualified subscribers was ever summoned; the representative managers purported to be appointed in the first instance by a meeting of the parishioners, and since that date there had been no triennial elections as required by the Order, but vacancies were filled by co-option. The Court of Appeal relied upon the fact that there was a quorum of three duly qualified managers at the meeting as required by clause 1 of Part B of the Schedule, but it is a fallacy to suppose that if the meeting, instead of consisting of three properly constituted managers and three strangers, had consisted of six properly constituted managers the result would have been the same. The provision as to the quorum involves the existence of a meeting of properly constituted managers.

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Meyers v. *Hennell* (1) is distinguishable, because it relates precisely to the kind of defect which clause 3 was intended to cure.

Tomlin K.C. and *Sheldon* for the respondents were not called upon.

LORD BIRKENHEAD L.C. My Lords, this is an appeal from a decision of the Court of Appeal given on May 15, 1918, affirming a decision of Peterson J. delivered on March 12 of the same year.

The case is by no means free from difficulty, and the persuasive advocacy of Mr. Maugham at one time led me to a conclusion upon one branch of the case which did not survive the whole argument. It looked at one time as if a very important question of law might have required decision, but, for the reasons which I will state to your Lordships in a moment, that did not prove to be the case. Had it been necessary to decide the point of law so raised, it would have been our duty very carefully to consider the judgments which ought to be given in this case; but, for the reasons I will presently state, it is not in my view proper for your Lordships to give a decision upon a matter which, as it seems to me, having regard to the view which your Lordships have formed, would be obiter.

My Lords, the history of this case may be very shortly stated. The plaintiff, the headmaster of a non-provided school at Sonning, complains of his dismissal from his position as headmaster, and he alleges that the termination of his services by the defendants, who are the managers of that school, is bad on a number of grounds. The grounds which require consideration are, first, that he was not dismissed on grounds connected with religious instruction under the terms of the relevant statute, and that the consent of the Berkshire education authority was a condition precedent to the right of the defendants to dismiss him; and secondly, that the defendants are not a duly constituted body of managers, and that for that reason they were not competent to dismiss him.

(1) [1912] 2 Ch. 256.

My Lords, the plaintiff has been the headmaster of this school now for a period of 18 years, and it was contended before us by Mr. Maugham that he had been harshly treated by the managers. I am unable to express any opinion upon that point, for the case must depend upon the view which your Lordships take of the relevant provisions of the statute. My Lords, he was appointed, as I have said, 18 years ago under a written agreement made in the year 1899, and he remained headmaster until the defendants gave him notice to determine his employment in 1917. The agreement was made between the managers, through the Vicar of Sonning, and the plaintiff, and under clause 3 of that agreement it was provided that it might be terminated by notice given in writing on either side of three calendar months, and in case of the said notice being given on either side it was provided that the plaintiff must give up the school premises and the master's house at the end of such notice.

My Lords, by the Act of 1902 there were of course variations in the method in which the plaintiff received his remuneration and there were also changes, it would appear, in the method in which the religious instruction in the school was dealt with; but during the period with which your Lordships are concerned it was supplied partly by the vicar, who was one of the managers, and partly by the plaintiff. From time to time examinations were held by the Diocesan Inspector, acting under the authority of the Bishop of Oxford, and it is not unimportant to notice that the inspection of the religious instruction was, of course, as is the object of all inspection, in order to test and to report upon the efficiency of the instruction which had been given in that branch of the studies. It is also material to notice that the religious instruction is given at a time when the school is not used as a school, but is closed for the purposes of ordinary education; the presence of the appellant was not compellable on such occasions and the services which he chose to render as the religious instructor were volunteered services.

In the year 1917 the Diocesan Inspector, who naturally would have attended for the purpose of making this inspection

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and presenting a report, was Mr. Nixon; he was unable to be present himself, but he furnished a number of written questions for the examination of the pupils, which were asked by Mr. Acworth, an assistant Diocesan Inspector, who examined the pupils viva voce. My Lords, the report was made by Mr. Acworth, and Mr. Acworth, in the course of that report, said: "The boys answered well as far as they could and appeared interested in the questioning in both classes." My Lords, the written report was corrected by the General Inspector as follows: "Written work in the class (upper) much below the average and distinctly poor. Prayer Book question not attempted by anyone. Papers of lower class quite good."

Now, my Lords, it would appear that for some years the plaintiff had been of opinion, whether he was right or whether he was wrong I do not know, that the reports which were made upon the work of his pupils were unjust to him and unjust to them. At any rate, it seems certain that he reached the conclusion that that part of the report which was adverse to the work of the school, which I have just read to your Lordships, had been written by Mr. Acworth, and he reached the further conclusion that that portion of the report was unfair, and under those circumstances he took a most unfortunate step, and one which has produced all the unhappy consequences in which he has found himself involved. He wrote a letter dated March 30, 1917, to Mr. Nixon, the Diocesan Inspector, which it is not necessary that I should read to your Lordships further than to call attention to a passage in the second paragraph: "We, of course, cannot help the unfortunate differences of opinion that exist between Mr. Crawfurd and Mr. Acworth. Surely this does not influence the latter gentleman when inspecting and reporting on our work." That paragraph may not unreasonably be construed as containing, first of all, the statement that there are unfortunately differences of opinion between Mr. Crawfurd, who was the vicar and chairman of the board of managers, and Mr. Acworth in this matter, and the second sentence in that paragraph may not unreasonably be construed as a suggestion

that as the result of these differences Mr. Acworth allowed himself to report less favourably than he otherwise would have done. It should be added, to complete the story, that Mr. Crawfurd, who was the vicar, as I have said, and chairman of the board of managers, was in the habit of assisting the appellant in giving religious instruction in the school; there was a division of labour between them which it is not necessary to explain more precisely. But the important letter in the case was dated April 3, 1917, and it was signed both by the appellant as headmaster, by the head mistress, and by all the other teachers in the school. It was addressed to Mr. Acworth, and it was in these terms: "We teachers are very disappointed and hurt over your Scripture reports. Strive as hard as we can, you never give us any praise or encouragement, but instead we get such vague and ambiguous expressions as 'this school has great possibilities,' 'the children answered as well as they were able,' and so on. As a consequence we regret to say we have lost faith in you and your methods of inspection, and instead of welcoming you to the schools as we should like, your visits and reports only upset and discourage us. We cannot help feeling that your little differences of opinion with our vicar (which are apparent to us and which we cannot help) do influence you when writing these reports. We honestly believe that you inspect and report conscientiously and to the best of your ability, but unconsciously perhaps your opinions are affected by these differences. Under the circumstances, we beg to propose that some arrangement will be made whereby you will be relieved of the necessity of writing these reports which must be as painful to you to write as they are for us to read. Failing some mutually satisfactory arrangement we teachers in justice to ourselves propose to lay the matter before the Bishop of Oxford."

Now, my Lords, no one of course will dispute, and Mr. Maugham did not dispute, that this was both an improper and an impertinent letter; it betrayed a complete failure on the part of the appellant to realize his position and his duties, and it was a letter which occasioned naturally and immediately great resentment. The plaintiff and the head

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mistress, Miss Connelly, were requested by and on behalf of the managers to withdraw the letter; they refused to withdraw the letter, and on May 15 the defendants gave notice to the plaintiff and to Miss Connelly that they were suspended for insubordinate conduct, and that the managers intended to report them to the local education committee with a view to dismissal. On the same day the Berkshire education committee was duly notified of the step which the managers had taken. In reply to that notification, on May 16, the secretary of the local education authority wrote a letter, and in the course of that letter alleged that the consent of the Berkshire education committee was not required for dismissals on grounds connected with the giving of religious instruction in the school, and it is worth while pointing out at this stage, before I make such reference as must be made to the terms of the Act of 1902, that the view of the local education authority throughout was that this was a dismissal which was made on grounds connected with the giving of religious instruction.

Now, my Lords, the importance of this observation in the letter of the local education authority is of course to be found in the circumstance that under the scheme of the Act of 1902, where the dismissal of a teacher is made upon grounds connected with the secular work of the school, the responsibility for the dismissal and the power to dismiss are in the local education authority; but where, on the other hand, the dismissal is made "upon grounds which are connected with the giving of religious instruction," (2 Edw. 7, c. 42, s. 7 (1.) (*c*)), the power to dismiss is in the hands of the managers, and it follows from that that if in this case the appellant was dismissed upon grounds connected with the giving of religious instruction, the managers were entitled so to dismiss him without consulting anyone, but if he was not dismissed, on a true view of the facts and on the meaning of the statute, on grounds connected with the giving of religious instruction, the dismissal in this case could not or might not be supported, on the ground that the local education authority was not consulted.

Now, my Lords, it becomes necessary to consider whether or not this was a dismissal upon grounds connected with the giving of religious instruction. I have formed the conclusion, though not without some difficulty, that in this case the appellant was so dismissed, and it is convenient that I should shortly summarise the reasons which have led me to this conclusion; and let me in order to do that as clearly as I can in a few sentences recapitulate what actually happened. The appellant was giving religious instruction; it became necessary that a report should be made upon the religious instruction which he was giving; the inspector attended for the purpose of holding an inspection and writing such a report. He attended and he wrote a report. The appellant receives the report and immediately writes a letter to the inspector which is admitted by his own counsel to be an improper and insubordinate letter; he is thereupon suspended and ultimately dismissed by the managers. Is or is not that dismissal on grounds connected with the giving of religious instruction?

My Lords, after hearing the whole argument, although, as I have already stated, I was in doubt for some time, I have reached the conclusion that he was dismissed on grounds connected with the giving of religious instruction. It is quite true that in terms it was stated at the time of his suspension and of his dismissal that the cause of that suspension and ultimately of that dismissal was the writing of an insubordinate letter. It is quite true that Mr. Rose, one of the managers, and the only manager who was called to give evidence, stated that the managers had never considered the merits of the dispute as between the inspector and the appellant, that they had dismissed him upon a consideration of the impropriety of the letter which he had written. But if one analyses the situation a little carefully that answer in my judgment by no means concludes the matter as against the respondents. It is quite true that the immediate cause of the dismissal was the writing of the impertinent letter, but the writing of the impertinent letter itself sprang out of and was so intimately connected with the giving of religious instruction that in my judgment it must be held that the

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ground of the dismissal was connected with the giving of religious instruction.

My Lords, I have only one observation to make upon this part of the case. In construing the section, it must not, I think, be forgotten that the object of the Legislature was to retain in the hands of the managers matters which were generally concerned with the giving of religious instruction. The Legislature has used very wide language. It would have been possible to have used very limited language. It has chosen, in a vague and general expression, to say that where a teacher is dismissed on grounds connected with the giving of religious instruction, the decision shall be with the managers and not with the local education authority. The conclusion which I have reached is that the Legislature designedly used general language in order to increase rather than to diminish the area within which the discretionary power of the managers survived. For these reasons I am of opinion that the appellant in this case was dismissed upon grounds connected with the giving of religious instruction.

My Lords, if he was not so dismissed, if your Lordships' conclusion had been in the contrary sense, a very difficult question would have required the consideration of your Lordships. If he was so dismissed, the question referred to becomes irrelevant, and any observations made by your Lordships upon it could only be made obiter. I imagine that your Lordships, having reached the conclusion that he was dismissed on grounds connected with the giving of religious instruction, would not be enamoured of an abstract discussion, and for my own part, having formed this view, I cannot be a party to a debate which I should regard as superfluous.

My Lords, there remains a further point which was argued before us this morning with great ingenuity by Mr. Maugham, and the contention which is advanced on this part of the case is that the managers who reached the decision, first to suspend and then to dismiss the appellant, were illegally constituted. Your Lordships were referred in great detail to such evidence as was available to the Courts below upon this point, and the attention of your Lordships was directed

to the schedule of the Act and to the forms which were appropriate for the circumstances which have arisen. I do not think it necessary to examine that material in any detail for this reason, that I am willing to assume, and I do assume, for the purpose of the conclusion which I have reached, that three of the managers had not been legally elected.

Now, my Lords, what follows from that circumstance? It is contended by Mr. Maugham that the circumstances of their election were so completely defective and that the degree of irregularity had been so extreme, and so protracted, that the section, to which I will shortly direct your Lordships' attention, has no application, and therefore, he says, the decision and the action which the managers purported to take have no effect at all.

There would have been much to be said for this view if it had not been for the actual words of the statutory provision. Your Lordships will recollect that under the first schedule to the Act of 1902, and under clause B, there are two or three rules which are highly relevant to this contention. The first rule of the second paragraph contains a proviso which is as follows: "Provided that the quorum shall not be less than three, or one-third of the whole number of managers, whichever is the greater." For the reason which I will presently give, I agree with the learned Lords Justices who dealt with this matter that that proviso is not without its relevance and importance. Rule 3 is as follows: "The proceedings of a body of managers shall not be invalidated by any vacancy in their number, or by any defect in the election, appointment or qualification of any manager"; and rule 11 is as follows: "Until the contrary is proved, a body of managers shall be deemed to be duly constituted and to have power to deal with the matters referred to in their minutes."

Now, my Lords, it is contended on behalf of the respondents, and it has been decided by the Court of Appeal, that the irregularities, to which I have drawn your Lordships' attention, and which for the purpose of my decision I am assuming, are met by the express language of the third rule: "The proceedings of a body of managers shall not be invalidated

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by any vacancy in their number, or by any defect in the election, appointment or qualification of any manager." Mr. Maugham replies to that in various ways ; I do not examine them all or in detail, but I was not convinced by any of them and, indeed, his difficulties involved him in the necessity of contending that when the rule says " any defect," it must not be construed as " any fundamental defect " but must be considered to deal with some more trivial defect. My Lords, I cannot so construe these words. In my view the object of Parliament was this : to make sure that where a body of managers had acted, their transactions should not be impeached thereafter by persons, whether they were teachers or whether they were tradesmen or whoever they might be, who desired to raise the objection that an individual manager had not been properly appointed. A moment's reflection would show how many cases might arise in which great annoyance, inconvenience and expense might be entailed by a controversy of this kind without any gain of any kind to the public interest. I think therefore that Parliament, in order to avoid such actions and objections, determined to use language of a singular wideness. It would be difficult to discover language wider than that which the Legislature employed in this rule 3. Parliament has said that any defect in the election, any defect in the appointment, any defect in the qualification of any manager, shall not invalidate its proceedings.

Now, my Lords, my own assumption here is that there were defects in the election, defects in the appointment, and defects in the qualification of these three managers. What then is the effect of such a conclusion ? The effect of it must be that which the rule says, that their proceedings in spite of those circumstances shall not be invalidated.

My Lords, their Lordships in the Court of Appeal, I think unanimously, thought that it was a relevant circumstance that there were present at that meeting three members whose qualifications were not in question. I also think that observation a relevant one, and for this reason ; that I think the true meaning of rule 3 is that the proceedings shall not be invali-

dated for the reasons stated there; but I am still of opinion that the proviso to rule 1 remains, and that the proceedings, although they may not be invalidated by defect in the election, appointment or qualification of a manager, must depend upon the presence of a quorum as provided by the proviso to rule 1. Therefore I think it was a relevant circumstance, as their Lordships thought in the Court of Appeal, that there were three qualified members present.

My Lords, I have only one further observation to make and that is upon the contention which Mr. Maugham very persuasively developed before your Lordships upon the language of rule 11. Rule 11 is in the following terms: "Until the contrary is proved, a body of managers shall be deemed to be duly constituted and to have power to deal with the matters referred to in their minutes." Mr. Maugham contends upon that that while rule 3 is to be constructed in the manner in which he attempts to construe it, it is to be read side by side with rule 11, and that the result is that while there shall be a presumption that the body of managers has been duly appointed that is a rebuttable presumption, and he claims that he is entitled to demonstrate the contrary to-day as he has attempted to do. My Lords, it is sufficient for me to say that so far as I am concerned I cannot reconcile such a construction of rule 11 with rule 3, nor is it credible to me that rule 3 should have been worded as it is worded if the true view of rule 11 had been that for which Mr. Maugham contended. As I attempted to point out in the course of the debate, it is not necessary that one should do such violence to a joint construction of rule 3 and rule 11 as Mr. Maugham invites us to do, because there are many legitimate occasions which can be conceived in which a useful meaning can be given to rule 11. For instance, rule 3 has in no way protected the proceedings of a body of managers excepting in the matter of a defect in their election, appointment or qualifications; it does not interfere in my judgment, for the reasons I have given, with the requirements of the proviso as to a quorum, and a proper operation can be found for rule 11 in the circumstance where a body of managers has not been duly constituted, because

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there has not been the regular and necessary quorum in attendance.

For these reasons, my Lords, I am of opinion that the defect to which attention has been directed is effectively met by the terms of rule 3. The conclusion follows that this appeal must be dismissed with costs, and I move your Lordships accordingly.

VISCOUNT FINLAY. My Lords, this appeal is brought in an action the object of which was to have it declared that the dismissal of the plaintiff from his position as teacher in a non-provided school had not been validly effected. The notice of dismissal was given by the board of managers and it is impeached upon two grounds. In the first place, it is said that the consent of the local education authority was necessary under the circumstances, having regard to the terms of the Act, and, in the second place, it was said that those who affected to dismiss the plaintiff were not really managers at all.

My Lords, the plaintiff was appointed under an agreement in the year 1899, and, according to that agreement, he was entitled to three calendar months' notice of dismissal. The notice given in the present case was, in accordance with that agreement, a three months' notice; but it was said that the consent of the local education authority ought to have been obtained to the giving of that notice, and that depends upon the question whether or not the notice of dismissal was given on grounds connected with the giving of religious instruction in the school. The provision in the Act of 1902 which is relevant is contained in s. 7, the first sub-section under head (c). That clause provides that "the consent of the Local Education Authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school." If the dismissal was not on grounds connected with the giving of religious instruc-

tion in the school, the consent of the local education authority would have been wanted. It is asserted on behalf of the managers that the ground of dismissal was connected with the giving of religious instruction in the school.

Now, my Lords, the meaning of the words "grounds connected with the giving of religious instruction in the school," I think, is this: If the managers think proper to send a teacher away, giving him of course the notice provided for by his agreement, unless the circumstances are such as to amount to misconduct which would justify dismissal without notice, with which we have nothing to do in the present case, the managers may exercise the power of dismissal without consent if the ground was something which was calculated to affect the giving of religious instruction in the school. To my mind that is the fair effect of the words "unless the dismissal be on grounds connected with the giving of religious instruction in the school." It must be on a ground of such a nature that it might reasonably be considered to have some effect on the giving of religious instruction in the school—"connected" in that sense.

In this case, my Lords, what happened was this: A necessary part of the religious instruction, or indeed of any instruction, is that examinations shall be held from time to time, that there should be an inspection to test the progress of the pupils and to see how the instruction was given. An inspection was held with regard to religious instruction, and your Lordships have had before you the questions which were put and the report which was made by the inspector, which has been read by my noble and learned friend on the Woolsack. The teachers were very much dissatisfied with the terms of that report, and the teachers as a body sent a letter, which was signed first by the headmaster, the present appellant, reflecting on the conduct of the inspection of religious instruction in the school not only on this particular occasion but on previous occasions. I need not say anything about the contents of that letter; it is admitted to have been improperly worded, and it seems to me that if letters of that kind were to be sent by the teachers of the school on the occasion of inspection

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with regard to religious instruction, it certainly would be a circumstance calculated to affect the giving of religious instruction. It would interfere with what is a necessary part of the religious instruction, the inspection; it would be calculated to occasion friction; and it appears to me that, although the act of writing that letter was stigmatised, and justly stigmatised, as an act of insubordination, it was an act of insubordination which in its nature might affect the giving of religious instruction in the school.

My Lords, we have nothing to do with the question whether the managers exercised a right judgment in deciding to dismiss the plaintiff on account of the sending of that letter. That was a matter entirely for them. and their judgment is not and cannot be under appeal. So the question is whether the occasion was such that the ground of dismissal was connected with the religious instruction. If so, the consent of the local education authority was not required, and the notice was good.

We had a long argument on the construction of the section as to whether, assuming that the consent of the local authority was required, the teachers could take advantage of the point; but, inasmuch as the plaintiff fails at the first step, in my opinion, to make out that the ground of dismissal was unconnected with the giving of religious instruction, it is not necessary to say anything upon the other part of the case.

Now, my Lords, that being so, the plaintiff falls back upon his second ground, and that is this, that those who affected to dismiss him were not really managers at all. Now the managers of non-provided schools are under the Education Act, 1902, two persons appointed, one, where the local education authority is the council of a county, by the county, and the other by the minor local authority, and in addition to that, there are four foundation managers. There is no question about the appointment of the two managers in the present case appointed by the county council and by the minor local authority. Further there are four representative managers; one of these is in this case the vicar of the parish, and as to his title to be a manager there is no question

at all. But then it is said that the other three of the four representative managers were not properly elected and, in fact, were not managers at all. Now in my opinion that has not been established and, if it had been established, the defect would be cured by the provisions made under statutory authority. It is said that the election ought to have been made in pursuance of the provisions which are set out at p. 153 and the following pages of the Record. The provisions made under s. 11, sub.-s. 1, of the Education Act, 1902, for cases in which there is no trust deed, or the provisions of the trust deed are not applicable to the case of the foundation managers, are shortly as follows: The third rule is that the ex-officio manager is to be the principal officiating minister of the ecclesiastical parish. Then "the representative managers" (this is rule 4) "shall be qualified persons elected by qualified subscribers to the funds of the school at a meeting to be held triennially for that purpose. Their term of office shall be three years, but they shall remain in office till their successors are elected or otherwise appointed and shall be eligible for re-election or re-appointment." Now, my Lords, it is said that there was no election held in the terms of the fourth of the regulations issued by the Board of Education under s. 11 of the Education Act, 1902, that what was held for the election was a meeting of parishioners. The minute of the meeting is at p. 132 of the Record, and it is in these terms: "June 2, 1904. A meeting of the parishioners of Sonning was held at the Pearson Hall on June 2, in accordance with the instructions received from the Educational Office, Whitehall, to elect Foundation Managers," and then it is stated that certain persons were elected. My Lords, it is said that this was not a meeting of qualified subscribers but merely a meeting of parishioners, and that the electors had no qualification whatever for choosing the foundation managers. I am not at all satisfied that that is established. The persons who attended that meeting may have been parishioners and also qualified subscribers, and that that is the case is made very probable by the fact that although, in the first instance, it is described as a meeting of the parishioners of Sonning,

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the Minute goes on to say that the meeting was held "in accordance with the instructions received from the Educational Office, Whitehall"; and, further, the burthen of proof in a matter of this kind would be with those who impeach the qualification of the persons who acted, and to my mind it is far from clear that the meeting held was not a meeting of qualified subscribers. Of course it is for those who assert that the persons who acted were not duly elected to establish it.

Now, if, as I think, it ought to be assumed, in the absence of much more evidence than we have got here, that the meeting was a meeting of qualified subscribers and they elected three representative members, these representative members so elected would, under the rule which I read just now (on p. 154 of the Record), rule 4, remain in office—"Their term of office shall be three years, but they shall remain in office till their successors are elected or otherwise appointed and shall be eligible for re-election or re-appointment." They would remain in office till their successors were elected. But it is said that no triennial meetings were held. Very well, then under that the effect would be that, if these persons were elected validly in the first instance, they would continue to hold office till their successors were properly elected; but, in truth, my Lords, that is not necessary even if the first election was bad. The provisions in the First Schedule to the Education Act under Head B, rule 3, would obviate the difficulty of which so much has been made. The chairman, the vicar, was undoubtedly a member, the two members elected by the county council and by the parish council respectively were undoubtedly members. You therefore had a quorum of three. Then it is said that the other three members were not validly elected. Well, assuming that to be the case, then you have to deal with rule 3, under Head B, of the First Schedule to the Act: "The proceedings of a body of managers of a school provided by the Local Education Authority shall not be invalidated by any vacancy in their number, or by any defect in the election, appointment or qualification of any manager." It is said that that cannot apply to a grave defect. My Lords, it applies to a defect which would other-

wise invalidate the election, and one cannot distinguish as to the character of the defect if it otherwise would have the effect of invalidating the election. It is cured in any case, whether venial or grave, by this provision.

It appears to me, therefore, that the second objection fails, first in point of fact, and, secondly, in point of law. If there were anything on the facts which showed that the representative managers were not duly elected, the provision in rule 3, under Head B, of the First Schedule would prevent the proceedings being invalidated.

My Lords, it appears to me that this appeal fails on both grounds.

LORD ATKINSON. My Lords, I concur, and I have little to add.

On May 15, 1917, six gentlemen purporting to act as the managers of the Sonning school dismissed the plaintiff for having written a most insubordinate letter to the inspector of the school. There are two questions, and two questions only, as I understand it, arising for the determination of your Lordships. The first is, had such a body power to dismiss their teachers of their own motion on the ground assigned? That is a pure question of law, a question of the construction of the statute, and I express no opinion as to whether the action of that body was wise or was harsh, was considerate or was unjust. These are moral questions with which I conceive we have nothing to do. It is the decision of the legal question that alone concerns us.

Now I think it is plain what the scheme of this Act is. The local body, the ratepayers, were made responsible for the conduct of all secular instruction in public elementary schools not provided by them; they were made responsible for and had the control of that education. But the object of the Act was, I think, to leave the giving of religious instruction, the selection of the persons to give it, the conditions under which it should be given, and the tests which should be applied to ascertain whether it was given efficiently, entirely to the control and responsibility of the managers; and there-

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fore the question for decision resolves itself into this, was the writing of this insubordinate letter, under the circumstances in which it was written, a ground of dismissal connected with the giving of religious instruction in the school? That any exhibition of insubordination was calculated to have a deleterious effect upon the giving of religious instruction in the school is, I think, apparent. If the ordinary persons whose duty it was to give religious instruction were permitted to assail their superiors in offensive and insubordinate terms because they objected to the mode in which their superiors or their inspector had done their or his duty, I think nothing could be more calculated to have an injurious effect upon the giving of religious instruction in the school. And therefore the first question for decision is, were the grounds of the dismissal connected with the giving of religious instruction?

Now when one considers for a moment how it came about that this insubordinate letter was written, namely, that it was written as an offensive protest attributing to the inspector unworthy motives in the matter of his having made a report upon the efficiency of the religious instruction given in the school, it appears to me that that is directly connected with the giving of religious instruction in the school. It is protesting against the report which was made as to the quality of the religious instruction given, and it appears to me that on that ground it comes within the wording of this section.

My Lords, I give no opinion upon the question which arose as to whether, in a case of this character, where a person continues to serve under an old agreement entered into before the passing of the Act, and this Act was superimposed upon the whole enterprise of giving instruction, the managers can now, after the passing of the Act, exercise their power of dismissal. It is a difficult question, and one which does not call for decision on the present occasion.

The other point which has been taken, and argued with great subtlety and persuasiveness by Mr. Maugham, is that the body who gave this notice on May 15, 1917, was not duly constituted, and he contends that the eleventh section of head (B) of the First Schedule enables him to raise that question

because it says "until the contrary is proved, a body of managers shall be deemed to be duly constituted and to have power to deal with the matters referred to in their Minutes." That, he says, gives him liberty to prove that they were not duly constituted. But when he comes to show the grounds upon which they were not duly constituted, it is merely that they were not properly elected; i.e., were not elected by the proper body or on a proper occasion. But as soon as he alleges that ground, then, in my judgment, he would appear to be met at once by the third section, which says: "The proceedings of a body of managers shall not be invalidated by any vacancy in their number, or by any defect in the election, appointment or qualification of any manager." You get no further then. It may be that you impeach their constitution by the fact that they were not duly elected, but the moment your assault is narrowed to that issue, s. 3 is a complete protection and a complete barrier. On both these grounds I think that the appeal fails and should be dismissed with costs.

LORD WRENBURY. My Lords, in this case three points have been argued before your Lordships; upon two of them opinions were expressed in the Court of Appeal, and, inasmuch as upon both those points they arrived at conclusions adverse to the plaintiff, it became unnecessary for them to determine, and they have not determined, anything about the remaining point. Your Lordships find yourselves, I think, in the same position as the Court of Appeal found themselves.

The first point in logical sequence which arises is this. The plaintiff says "I was dismissed, but the body which dismissed me were not a body of managers and had no authority. Whether consent by the local education authority was wanted or not does not matter; the managers were not a proper body to act, and their dismissal amounts to nothing." Now that is a question which turns upon the provisions of the first schedule to the Education Act, 1902, head (B). The difficulty which arises, if there be a difficulty, is in the suggested conflict between article 3 and article 11 of those provisions. The

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facts were these. The body which acted were a body of six present at one meeting and five present at another, but the exact number of persons present is not material. Three of them were unquestionably proper managers; they were the Rev. Mr. Crawfurd, vicar of the parish, who was an ex-officio manager, and Colonel Barker and Mr. Wright, who were respectively persons appointed under s. 6 of the Act of Parliament, the one by the county council and the other by the parish council; the remaining three were Mr. Mathews, the Rev. Mr. Penruddock and Mr. Rose. For the purpose of what I have to say I shall assume that no one of these last three persons was lawfully elected or appointed to be a manager. There was present therefore a body of six persons, of whom three were duly qualified managers and three, upon the hypothesis I have made, were not managers. Under these circumstances what is the effect of the schedule to the Act of Parliament?

Article 3 says: "The proceedings of a body of managers shall not be invalidated by any vacancy in their number, or by any defect in the election, appointment or qualification of any manager." If I read those words I have to say to myself, "Of these three managers A. was not a manager because (say) there was a defect in his election, B. was not a manager because (say) there was a defect in his appointment, and C. was not a manager because (say) there was a defect in his qualification, but the proceedings of the body are not invalidated by reason of any of those defects." The article says so in plain terms.

But then it is said, and it is the fact, that difficulty arises from article 11, which runs thus: "Until the contrary is proved, a body of managers shall be deemed to be duly constituted and to have power to deal with the matters referred to in their minutes," from which inferentially you may say that when the contrary is proved a body of managers shall not be deemed to be duly constituted. But does it mean that? The solution of that question, in my judgment, lies in this: article 3 and article 11 both use the expression "a body of managers." Article 11 must mean such a body

of managers as has been already identified and defined by article 3; that is, a body of managers whose proceedings are not to be invalidated by any of the defects to which I have referred. If within the language of article 11 "the contrary is proved," still article 3 says, that even if those things are proved the proceedings are not to be invalidated by reason of its being shown that the suggested defects existed.

It remains, and I think there is relevance in the fact, that article 1 had provided that a quorum should be not less than three, or one-third of the number of managers whichever was the greater. It was pointed out in the Court of Appeal that there was a proper quorum here of three persons validly appointed. I agree that if it turned upon that alone, a quorum means the required number of a larger number who are properly qualified, and therefore this point alone will not decide the case. But upon the grounds which I have already advanced I submit to your Lordships that upon these regulations I must shut my eyes to the fact that these three gentlemen were—if the facts be that they were—subject to a defect in their election, and I am bound to say that the proceedings of the managers were not invalidated by that fact. For these reasons I think that this point must be decided adversely to the plaintiff.

The second point is this. The plaintiff says, "Well, assume that there was a body of managers competent to act, still there was not the proper consent, the managers could not act without the consent of a certain body, the local education authority." That turns upon the wording of s. 7 (1.) (*c*) of the Act, "The consent of the Local Education Authority . . . . shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school." Was there or was there not a dismissal here on grounds connected with the giving of religious instruction in the school? If there was, no consent was wanted.

In construing these words regard must be had to this state of facts: non-provided schools may be said to exist for two purposes, the one the purpose of secular education in which

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the control rests primarily and to a large extent exclusively, with the local education authority ; the other the purpose of giving religious instruction. Under the latter head the local education authority have no voice at all ; that is a matter which is to be governed entirely by the persons who are the managers of the school. Next I think regard must be had to the consideration that the words are "connected with the giving of religious instruction in the school." The word "giving" is not to be confined to the mere act of the teacher towards the scholars in instructing them in the school; "giving" includes any proper test of the efficiency of giving. The examination which has to be held by the inspector to ascertain whether the religious instruction has been efficient or not is an act done in connection with the giving of religious instruction; it is a necessary act upon his part which is connected with the giving and for testing the efficiency of the giving of the religious instruction.

What took place in the present case was this. The ground of dismissal, the cause of dismissal, was insubordination, but insubordination in respect of what? It was insubordination in respect of an impertinent and insubordinate letter written by the teacher with reference to the action of the inspector, who had come there to test the efficiency of the religious instruction which was given by the teacher. My Lords, it appears to me that that dismissal, although insubordination was the reason for the dismissal, was a dismissal which was based upon a ground connected with the giving of religious instruction in the school, and that being so, as it appears to me, no consent was wanted.

Those two points being decided adversely to the plaintiff, there was, and is no doubt, a third point. That is a question upon the construction of s. 7 of the Act of 1902—a question whether the teacher had any rights conferred upon him by that section. That matter has been the subject of a difference of judicial opinion in the two cases of *Young* v. *Cuthbert* (1) and *Smith* v. *Macnally*. (2) It is a point

(1) [1906] 1 Ch. 451. (2) [1912] 1 Ch. 816.

upon which the Court of Appeal have pronounced no opinion. It is a point which does not arise for decision when the other points are decided as your Lordships are deciding them. It is a point upon which your Lordships directed that the argument should not be fully concluded, because, having regard to the other two points, it was not necessary to decide it and you therefore did not call upon the plaintiff's counsel to reply upon it. Each of those forms an exceedingly good ground for not dealing with it now by way of any expression of the opinion of your Lordships. Moreover I must express my opinion that, if a point does not arise for decision, particularly in this House, it is not only not useful, but it is mischievous to express an opinion upon it. As a judge I myself often suffered from cases in which a Superior Court has from time to time expressed an opinion which was not a decision and therefore did not bind me as a judge, but which nevertheless, out of respect to those of greater authority than myself, I could not but regard. To decide a point which does not arise, in my view is only mischievous. Upon this ground, my Lords, I abstain altogether from expressing any opinion whatever on the third point.

On the other two points I am of opinion that this appeal ought to be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 23, 1919.

Solicitors for appellant: *Baker & Nairne.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Blandy & Blandy, Reading.*

[HOUSE OF LORDS.]

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CENTRAL CONTROL BOARD (LIQUOR TRAFFIC) . . . . . } APPELLANTS;

AND

CANNON BREWERY COMPANY, LIMITED . . . . . } RESPONDENTS.

Emergency Legislation—Liquor Control—Compulsory Acquisition of Licensed Premises—Compensation—Mode of Assessment—Defence of the Realm (Amendment) (No. 3) Act, 1915 (5 & 6 *Geo.* 5, *c.* 42), *s.* 1, *sub-s.* 2 (*b*)—*Defence of the Realm (Liquor Control) Regulations, Regs.* 6 & 7—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 1 *and* 2.

Where the Central Control Board (Liquor Traffic), under the powers conferred on them by the Defence of the Realm (Amendment) (No. 3) Act, 1915, and the Defence of the Realm (Liquor Control) Regulations 1915, acquire compulsorily the fee simple of licensed premises, the owner's claim to compensation is not limited to such compensation as may be granted to him as a matter of grace out of public moneys on the recommendation of the Royal Commission of Inquiry, dated August 2, 1915, as to compensation in respect of loss of property or business in the United Kingdom occasioned by exercise of powers by the Central Control Board (Liquor Traffic), but he is entitled to claim compensation as of right under the Lands Clauses Consolidation Act, 1845.

Decision of the Court of Appeal [1918] 2 Ch. 101 affirmed.

APPEAL from a decision of the Court of Appeal affirming a decision of Younger J. (1)

The question raised by the appeal was whether the appellant board were empowered by virtue of the Defence of the Realm (Amendment) (No. 3) Act, 1915, and the Defence of the Realm (Liquor Control) Regulations, 1915, made in pursuance of that Act, to acquire compulsorily the fee simple of licensed premises belonging to the respondent company without paying compensation therefor beyond such sum as might by an act of grace be awarded to the respondent company

* *Present:* VISCOUNT FINLAY, LORD ATKINSON, LORD PARMOOR, and LORD WRENBURY.

(1) [1918] 2 Ch. 101.

out of public moneys, or whether the respondent company were entitled as of right to recover compensation under the Lands Clauses Consolidation Act, 1845.

The facts, which were not in dispute, are fully stated in the report of the case before Younger J. and the Court of Appeal and sufficiently appear from the judgment of Viscount Finlay.

Younger J. held that the respondent company were entitled to recover compensation under the Lands Clauses Acts, and his judgment was affirmed (by a majority) by the Court of Appeal (Swinfen Eady M.R. and Eve J.; Bankes L.J. dissenting). Bankes L.J. agreed with the other members of the Court that the respondent company had a legal right to compensation, but held that such compensation was recoverable by action at law and not under the provisions of the Lands Clauses Acts.

May 6, 8, 1919. *Sir Gordon Hewart A.-G.* and *Sir Ernest Pollock S.-G.* (with them *Giveen*) for the appellants.

It is not suggested that no compensation shall be paid to the respondents, but the question is by what tribunal the compensation shall be assessed. On March 31, 1915, His Majesty appointed a Royal Commission of Inquiry as to compensation in respect of Loss or Damage to Property or Business in the United Kingdom occasioned by exercise of rights and duties in the Defence of the Realm. On May 19, 1915, the Defence of the Realm (Amendment) (No. 3) Act, 1915, was passed, and on June 10, 1915, regulations in pursuance of that Act were made. On August 2, 1915, His Majesty appointed a further Commission (hereinafter referred to as the Losses Commission) substantially in the same terms as the earlier Commission, save that the appointment was directed specially to compensation under the Defence of the Realm (Amendment) (No. 3) Act, 1915. The powers of this Commission are in addition to, and not in substitution for, the powers of the earlier Commission. The appellants contend that the proper tribunal for the assessment of the compensation is the Losses Commission. Parliament, in

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passing this Act of 1915, intended that, at that special period and in the peculiar circumstances which then existed, all persons whose property was in any way interfered with by the Liquor Control Board should be put upon the same basis, and the Act and the Regulations must be construed as if the Act contained a provision that any party whose property was taken or injuriously affected by the Board should apply to the Losses Commission for compensation. That undoubtedly involves that the party has no legal right to compensation, but the reason for this provision was not that the Board should be let off lightly, but that fair and reasonable compensation should be given. The main contention against this is that where the licensed premises are taken compulsorily under the Act of 1915, compensation ought to be assessed by the machinery of the Lands Clauses Act, 1845, which must be assumed to be incorporated with the later Act. But, first, there is here no such undertaking as is contemplated by the Lands Clauses Act. The undertaking there contemplated is of a more concrete and tangible kind than what may be called the undertaking of the Liquor Control Board. It is difficult to apply that term to a system which primarily is not concerned with the acquisition of land, but is designed to give to the Board the control of the liquor supply; in ninety-nine cases out of a hundred the Act could have no application. The powers of the Board are the powers of a policeman, not powers of an industrial nature. Further, the Regulations expressly provide a procedure wholly at variance with that laid down by the Lands Clauses Act, which requires that compensation shall be paid before entry or that a deposit shall be made. Lastly, there is a difficulty in saying what is the Special Act in this case—it is a composite thing, the Act plus the Regulations. All these considerations point to the intention of the Legislature to exclude the operation of the Lands Clauses Act. If the appellants are wrong in their main contention, that the Losses Commission is the proper tribunal to assess the compensation, it does not follow that, if the Lands Clauses Act does not apply, the respondents are without a remedy, for they can proceed by

action or petition of right, as Bankes L.J. held, on the principle that where an Act of Parliament authorizes the compulsory acquisition of land and is silent as to compensation, the owner will not be deprived of his property without compensation except by the clearest language: *Bentley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1)

Clayton K.C. (*Upjohn K.C.* and *A. F. Wootten* with him) for the respondents.

There is a presumption that the Legislature does not authorize lands to be taken without a legal right to compensation—a presumption to be rebutted only by clear and unambiguous language. At the time when the first Commission was appointed there were certain acts which could be done by the exercise of the Royal Prerogative to property in respect of which the law provided no compensation, i.e., where there was no legal right of compensation at all, and the object of the Commission was to assess compensation in those cases. The second Commission was appointed for the same purpose, with special reference to the exercise of the powers of the Liquor Control Board. The proclamation provides for compensation for loss incurred by reason of interference with the applicant's property. "Interference" is an inappropriate term for the acquisition of the land of the subject absolutely. The allowance is a purely compassionate allowance in cases not otherwise provided for; there was no sanction by which any sum so recommended could be enforced; no power to award or give judgment. Further, the Commission was not a stable Commission for the purpose of compensation, for it could be revoked by the executive at any moment. This is not a case "not otherwise provided for," inasmuch as the Lands Clauses Consolidation Act, 1845, applies. It is said that there was an implication that the Act was not applicable, but that is not enough. When once there is an undertaking with power to take land—and it cannot be disputed that this is an undertaking within the Act—the provisions of the Act apply "save so far as they shall be expressly varied

(1) [1891] 3 Ch. 222, 232.

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or excepted by the Special Act." The words "so far as the same shall be applicable to such undertaking" meet the argument that the undertaking embraces other objects and is not primarily concerned with the taking of land. No doubt there is here no notice to treat and a different form of vesting is provided, and to that extent the Act is varied, but those are matters of procedure only, and do not affect the real purpose of the Act, which is the granting of compensation. Not only is inference alone insufficient to exclude the Act, but the inference here is that the Lands Clauses Act was intended to apply. In the Act of 1915 and the Regulations there is to be found the main division adopted by the Lands Clauses Act—purchase by agreement and purchase otherwise than agreement, or compulsory purchase—and the power in the Regulations to take the land "freed from any mortgages affecting the same" supports the view that the Legislature contemplated a legal right to compensation. The Act of 1915 contains nothing which deprives the respondents of their legal right to compensation, and the Lands Clauses Act is by its own terms incorporated: *Reg.* v. *London Corporation*. (1)

Sir Ernest Pollock S.-G. replied.

The House took time for consideration.

May 30, 1919. VISCOUNT FINLAY. My Lords, in this case the appellant board have under their Act and Regulations acquired the fee of a public-house at Enfield, "The Ordnance Arms," which belonged to the respondent company. An action was brought by the respondent company claiming a declaration that they were entitled to compensation under the Lands Clauses Act of 1845. The appellant board alleged by way of defence that compensation could be claimed only by application to the Royal Commission appointed on August 2, 1915, to inquire and report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid out of public moneys in respect of losses incurred

(1) (1867) L. R. 2 Q. B. 292, 295.

through the exercise of the powers of the appellant board under their Act and the Regulations thereunder.

The Defence of the Realm (Amendment) (No. 3) Act, 1915 (5 & 6 Geo. 5, c. 42) enacted that His Majesty has power in any area in which it appears desirable for specified reasons connected with the war that the liquor traffic should be controlled by the State to apply to such area Regulations to be issued under the Act (s. 1, sub-s. 1). The second sub-section of the same section confers various powers upon His Majesty in Council; the material words for the present purpose being as follows: "His Majesty in Council has power to issue Regulations under the Defence of the Realm Consolidation Act, 1914, to take effect in any area to which they are applied under this Act . . . (*b*) for giving the prescribed Government authority power to acquire, compulsorily or by agreement, and either for the period during which the Regulations take effect, or permanently, any licensed or other premises or business in the area, or any interest therein, so far as it appears necessary or expedient to do so for the purpose of giving proper effect to the control of the liquor supply in the area."

Regulations were made under the Act on June 10, 1915, the seventh of which gave power to the board to acquire compulsorily any premises by service of a notice of their intention to acquire them, and provided that after such a notice had been served the premises should vest in the board on the expiration of ten days from the service. Notice was served in respect of "The Ordnance Arms" on December 22, 1915, so that the property vested in the appellant board under the Regulation on the expiration of ten days from that date.

The question in the case is whether compensation is payable under the Lands Clauses Act of 1845. That Act provided by its first section that it should apply to every "undertaking" authorized by any Act to be thereafter passed authorizing the purchase or taking of lands, and went on to enact that all the clauses of the Lands Clauses Act, save so far as they should be expressly varied or excepted by the subsequent Act, should apply to the undertaking authorized thereby

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so far as the same should be applicable to such undertaking. The point to be considered is whether the Defence of the Realm (Amendment) (No. 3) Act, 1915, and the Regulations made thereunder should be regarded as the "special Act" authorizing an "undertaking" with power to take lands so as to incorporate the provisions as to compensation of the Lands Clauses Act. I do not think that it can be doubted that the control of the liquor trade set up under the Act of 1915 constituted an "undertaking" within the meaning of the Lands Clauses Act. That term is in the second section defined as meaning "undertaking, of whatever nature, which shall by the special Act be authorised to be executed." The expression cannot be confined to the execution of works and undertakings of a purely physical nature. It must include the control of the liquor traffic just as much as it would include the control of such an enterprise as, say, the Post Office. As the undertaking involves the purchase or taking of lands, the Lands Clauses Act is incorporated. The undertaking in the present case was authorized by the Regulations made under the authority of the Act of 1915 (5 & 6 Geo. 5, c. 42), and that Act, with the Regulations made under it and deriving their validity from it, must be regarded as the special Act for the purpose of the Lands Clauses Act of 1845. In my opinion as soon as the appellant board was so set up with its power to acquire land the Lands Clauses Act took effect as if its provisions had in terms formed part of the Regulations.

It was argued for the appellants that the terms of the Regulations are such as to exclude the provisions of the Lands Clauses Act as to compensation. For this purpose an express variation or exception of these provisions would be necessary. (See s. 1, Lands Clauses Act of 1845.) The Regulations, in so far as they provide for the vesting of the fee in the appellant board on the expiration of ten days from the service of the notice, are undoubtedly inconsistent with the provisions of the Lands Clauses Act as to the manner of acquisition of property, and to that extent there is an express variation or exception within the terms of s. 1 of the Lands Clauses Act. But there is no such express variation or exception

with regard to the provisions for compensation, and these provisions are, therefore, incorporated. As provision is thus made for compensation by the incorporation of the Lands Clauses Act, it follows that compensation for land taken cannot form the subject of inquiry and report by the Commission appointed on August 2, 1915, by Proclamation. That Commission has jurisdiction only "in cases not otherwise provided for." Indeed, the wording of the Proclamation is not very apt to give the Commission power to report as to payment for land acquired. The wording of the Proclamation in that respect is quite intelligible in view of the fact that compensation for the taking of land is otherwise provided for, i.e., by the incorporation of the Lands Clauses Act, and is therefore excluded from the jurisdiction of the Commission. In my opinion the Commission has no jurisdiction in the matter.

It was contended in the alternative on behalf of the appellants that compensation should be got, not by the machinery of the Lands Clauses Act, but by an ordinary action in the High Court against the board or by a petition of right. If, as I think, the Lands Clauses Act was incorporated no such course is possible. In any case, in order to support such an action or petition, it would have been necessary that there should be found in the Regulations a clear indication that there was a right to compensation, while at the same time no means of enforcing it was given. The right to compensation is given only by the incorporation of the Lands Clauses Act, and it follows that it is under the Lands Clauses Act, and that only, that compensation can be obtained.

In my opinion this appeal fails on every point, and should be dismissed with costs.

LORD ATKINSON. My Lords, the appellants, conveniently styled the board, purporting to act in exercise of the powers conferred upon them by the Defence of the Realm Consolidation Act, 1914, the Defence of the Realm (Amendment) (No. 3) Act, 1915, and the Defence of the Realm (Liquor

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Control) Regulations, 1915, in the month of December, 1915, admittedly, acquired compulsorily, by the peremptory methods authorized by this legislation, the fee simple in certain licensed premises known as "The Ordnance Arms," situated at Enfield Lock in the parish of Enfield in the county of Middlesex, of which the respondents were the owners in fee. It was not suggested that the above-mentioned Regulations were not intra vires; nor was it contended that the principle recognized as a canon of construction of statutes by many authorities, such as *Attorney-General* v. *Horner* (1), *Commissioner of Public Works (Cape Colony)* v. *Logan* (2), *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.* (3), did not apply to the body of legislation under which the board purported to act. That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms. I used the words "legal right to compensation" advisedly, as I think these authorities establish that, in the absence of unequivocal language confining the compensation payable to the subject to a sum given ex gratia, it cannot be so confined. I do not think that the Attorney-General really contested this, nor, as I understood him, did he contest the principle that where the statute authorizing the taking away of, or causing damage to, the subject's property, either does not provide a special tribunal to assess the amount of the compensation the subject is to receive, or only provides a tribunal which has become non-existent, the subject is entitled to have that amount assessed in the High Court of Justice: *Bentley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (4) The question in dispute between the parties resolves itself into this: how is the amount of the compensation which the respondents are legally entitled to be paid for the property taken to be ascertained? The respondents contend that, as the above-mentioned statutes and regulations under which the board purported to act, make no

(1) (1884) 14 Q. B. D. 245, 257.
(2) [1903] A. C. 355, 363.
(3) (1882) 7 App. Cas. 178, 188.
(4) [1891] 3 Ch. 222.

provision for the assessing of the compensation to which the owner of the property compulsorily taken has this legal right, the Lands Clauses Act, not being expressly or impliedly excluded, must apply unless their property is to be confiscated. The board apparently contend, or at least contended before the Court of Appeal, that the two statutes above mentioned contemplated the payment of compensation, but made no provision for the ascertainment of it, leaving that to be done thereafter by the Crown, or the executive, and that the sole provision subsequently made for that purpose was the appointment of the Royal Commission of August 2, 1915. The Defence of the Realm Consolidation Act of 1914 (5 Geo. 5, c. 8) empowered His Majesty in Council to make regulations providing for the suspension of any restrictions on the acquisition or user of land, or the exercise of any power under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903. The Defence of the Realm (Amendment) (No. 3) Act begins by reciting that where it appears to His Majesty that it is expedient for the successful prosecution of the war that the sale and supply of intoxicating liquor should in any area for the reasons mentioned be controlled, he may by Order in Council define the area, and may likewise by like Order apply to the area so defined the regulations issued in pursuance of this Act of 1915 under the Defence of the Realm Consolidation Act, 1914. It is difficult to say whether the opening lines of the second section of this statute of 1915 are a recital or an enacting clause. I think it is intended to be an enacting clause. It runs thus : " His Majesty in Council has power to issue Regulations under the Defence of the Realm Consolidation Act, 1914, to take effect in any area to which they are applied by this Act—i.e., the above-mentioned statute of 1915."

Then follow several provisions setting forth what these regulations may authorize and effect. First, for giving the prescribed Government authority, to the exclusion of any other person, the power of selling or supplying or controlling the sale or supply of intoxicating liquor within the area, i.e., the area defined ; second, for giving this same authority

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power to acquire compulsorily or by agreement, and either for the period during which the regulations take effect or permanently, any licensed or other premises or any business in the area, or any interest therein, so far as it appears necessary or expedient for the purpose of giving proper effect to the control of the liquor supply in the area; third, for enabling the same authority, without any licence, to establish and maintain refreshment rooms, etc.; fourth, for making any modification or adjustment between persons interested in licensed premises situate within the area; fifth, for giving effect to the transfer of the control of the liquor traffic in the area to the aforesaid authority, and for modifying, so far as may appear necessary and expedient, the provisions of the Acts relating to the licensing or sale of intoxicating liquor within the area. It will be observed that, though this statute provides for the acquisition of land and business premises, if needed for the carrying on of the trade of a publican and keeper of refreshment rooms, it gives no indication whatever as to whether the property taken by the Government authority shall be paid or compensated for, or if paid or compensated for, by whom, or by what authority or by what method the amount of the compensation is to be fixed. On the other hand, it contains not a single clause expressing in any kind of language, clear and unequivocal, or obscure and ambiguous, that the owners of the property acquired are not to be paid or compensated for it. According to the authorities I have already referred to, this statute must therefore be construed on the assumption that any property taken will be paid or compensated for. The several kinds of property or interest which may be acquired or dealt with are so essentially different in kind and nature that it may well be that the machinery for assessing compensation in one case may be unsuitable for assessing it in the other. But as to land compulsorily taken for public undertakings there is by statute established a well-known method of assessing compensation for the loss of such land. It would appear that this method is in itself not inapplicable to the acquisition of land for forwarding the enterprise entrusted to the proposed Government authority.

Recourse to it is not expressly or impliedly prohibited. If that be so, then, as no other method is suggested, it would be but natural to conclude that this statute of 1915 was passed on the assumption that where land is acquired compulsorily for the above-mentioned purposes, the old method should be availed of, however unsuited it might be for the assessing of compensation when an entirely different kind of property is compulsorily acquired. The Regulations of June, 1915, enact that the prescribed Government authority shall be a board, to be called The Central Board (Liquor Traffic), thereinafter referred to as the board. It is not incorporated formally, but it may sue and be sued, has an official seal which is to be officially and judicially noticed, and to be authenticated by any two members of the board or its secretary. Property acquired by the board is to be vested in two of its members, appointed by it for the purpose, as trustees. By the sixth of these Regulations it is provided that where the board consider it necessary or expedient for the purpose of giving proper effect to the control of liquor supply within the area, they may acquire, compulsorily or by agreement, either for the period during which the regulations take effect or permanently, any licensed or other premises in the area, or any interest therein, provided that, in lieu of acquiring any interest in such premises, they may take possession of them and of the plant used for the purpose of the business carried on therein, etc. The seventh regulation provides that where the board determine to acquire compulsorily any premises or any interest therein, they shall adopt the procedure therein prescribed, which is as follows. They are to serve on the occupier of the premises, and, if any person other than the occupier will be affected by the acquisition of the premises, upon such person, and also on any person appearing to the board to be so affected, notice of their intention to acquire the premises, or such interest therein as may be specified in the notice.

When this notice has been served, then at the expiration of ten days from the date of the service on the occupier, the fee simple in possession of the premises, or the aforesaid

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interest in them, vests in the trustees, subject to, or freed from, any mortgages, rights, and interests affecting them as the board may by order direct. This last clause, in itself, would be almost enough to show that the legal right to compensation for the property taken was conferred upon its owner. It never could have been the intention of the Legislature to confiscate the rights of mortgagees and the other rights affecting the premises. No doubt the peremptory methods above provided for the acquisition of licensed premises are not the methods of the Lands Clauses Act of 1845, and were possibly intended to exclude these latter, but I concur with the Master of the Rolls in thinking that this is unimportant, that the question is whether the clauses of the Lands Clauses Act for assessing compensation are to be taken as incorporated with the Act passed in May, 1915, or expressly or impliedly excluded from that statute by its own terms, not by those of the subsequent Regulations, which cannot alter, affect, or reveal the meaning of the statute of earlier date. The purchase of land by agreement under the Lands Clauses Act is dealt with by a fasciculus of ten sections, six to fifteen both inclusive, and the acquisition of land compulsorily by a succeeding fasciculus of sections. It was further contended that the enterprise entrusted to the management of the board was not an "undertaking" within the meaning of the Lands Clauses Act, and therefore that this latter statute did not apply to it, and could not be taken as incorporated with the statute which must represent the "Special Act," namely, the Defence of the Realm (Amendment) (No. 3) Act passed May 19, 1915. The expression "undertaking" is by the second section of the Act of 1845 defined to mean "the works or undertaking, of whatever nature, which shall by the Special Act be authorised to be executed." Well, the control of the liquor traffic in a given area is undoubtedly a matter of a public nature, and the Regulations which the Act gives authority to issue prescribe the methods by which that control is to be exercised, namely, by acquiring licensed premises, carrying on therein the trade of a publican, providing refreshment

rooms and carrying on therein the appropriate business (including the supplying of intoxicating liquor) for the general public or for any particular class of persons. So that this Government authority is empowered to carry on this great enterprise by the various methods described, evidently with public money. I think it is clear that this enterprise is an undertaking within the meaning of the Lands Clauses Act. I think it is equally clear that this Government authority are "promoters" within the meaning of that statute; and it would certainly appear to me that the provisions of the Lands Clauses Act dealing with the assessment of compensation for land are not expressly or impliedly varied by the provisions of the Special Act, and are not inapplicable to the undertaking authorized by that Act. I think this board set up by the Regulations cannot, though not incorporated, be considered as the Crown, and is therefore bound by the Lands Clauses Act of 1845. I think the Master of the Rolls has in the following sentence, with which I fully concur, put succinctly the reasons for holding that the judgment of Younger J. was correct. He said (1): "I am of opinion that the Defence of the Realm (Amendment) (No. 3) Act, 1915, authorizes an undertaking, and also authorizes the purchase or taking of lands for such undertaking, and it is quite immaterial that the detailed Regulations are defined by an Order in Council, which the statute itself authorizes. The undertaking is authorized by the statute, and nothing but a statute could so authorize any such undertaking. The compulsory purchase of land, and superseding the ordinary licensing law, could only be effected by statute. In my opinion the Lands Clauses Acts apply to an undertaking authorized by the Defence of the Realm (Amendment) (No. 3) Act, 1915."

This conclusion is quite in harmony with the decision in *In re Wood's Estate.* (2) The appeal should, I think, be dismissed with costs.

LORD PARMOOR. My Lords, the Defence of the Realm

(1) [1918] 2 Ch. 124. (2) (1886) 31 Ch. D. 607.

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(Amendment) (No. 3) Act, 1915, enacts that, where it appears to His Majesty that it is expedient for the purpose of the successful prosecution of the present war that the sale and supply of intoxicating liquor in any area should be controlled by the State, on the ground that war material is being made or loaded or unloaded or dealt with in transit in the area, or that men belonging to His Majesty's naval or military forces are assembled in the area, His Majesty has power, by Order in Council, to define the area and to apply to the area the Regulations issued in pursuance of this Act under the Defence of the Realm Consolidation Act, 1914. It is further enacted that the Regulations may give the prescribed Government authority power to acquire, compulsorily or by agreement, and either for the period during which the Regulations take effect, or permanently, any licensed or other premises or business in the area, or any interest therein, so far as it appears necessary or expedient to do so for the purpose of giving proper effect to the control of the liquor supply in the area. Regulations were duly made and power was given to the Central Control Board to acquire compulsorily or by agreement, and either for the period during which the Regulations take effect, or permanently, any licensed or other premises in the area, or any interest in any such premises. By Order in Council of September 24, 1915, an area was defined known as the London Area, and the provisions of the said Regulations and the powers of the appellants were thereby made applicable to such area. The fully-licensed premises known as "The Ordnance Arms" at Enfield Lock are situate within the said area, and at all material times the respondents were owners in fee simple thereof. On December 22, 1915, the appellants gave notice to acquire permanently the said premises, and intended to acquire the same compulsorily freed from any mortgages, rights, or interests affecting the same and the business carried on thereon. By virtue of clause 7 of the Regulations the said premises and business vested in trustees for the appellants, and the appellants went into possession thereof on or about January 4, 1916. On July 5, 1916, the respondents gave notice to the appellants that they intended

to serve a notice upon the appellants under s. 68 of the Lands Clauses Consolidation Act, 1845. This notice was served on July 21, 1916, the respondents claiming therein the sum of 13,630*l.*, and interest at the rate of 5 per cent. The appellants contested the right of the respondents to proceed under the Lands Clauses Act, and did not cause a jury to be summoned, whereupon the respondents issued a writ against the appellants in the Chancery Division, and Younger J. delivered judgment holding that they were right in the principle for which they contended, and were entitled, by virtue of the said Acts and Regulations, and by virtue of the Lands Clauses Acts, to proper compensation for and in respect of the fully-licensed premises known as "The Ordnance Arms." This judgment was confirmed by a majority of the Court of Appeal.

My Lords, I think it is clear that the Lands Clauses Acts do apply, and that the judgments of the Courts below should be affirmed.

The Lands Clauses Act, 1845, is made applicable to every undertaking authorized by any Act which shall thereafter be passed and which shall authorize the purchase or taking of lands for such undertaking, and shall be incorporated with such Act. There is no doubt that the Act and Regulations in question do authorize the purchase and taking of lands, but it was argued that there was no undertaking authorized such as was contemplated in the Lands Clauses Acts. The word "undertaking" in the Lands Clauses Acts means the undertaking, of whatever nature, which shall by the special Act be authorized to be executed, and the question arises whether there is such an undertaking in the present case. I agree with Younger J. that the board's undertaking may not improperly be described as the control or monopoly in the national interest of the sale and supply of excisable liquors within the prescribed naval and military or munition areas. If this is correct, it follows that the Lands Clauses Act is incorporated with the Special Act, and that all the clauses and provisions of the Lands Clauses Act, save so far as they shall be expressly varied or excepted by any such Act, apply to the undertaking authorized thereby so far as the same shall

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be applicable to such undertaking. The only express variations of the Lands Clauses Act are contained in s. 7 of the Regulations, but these variations only apply to methods of procedure, and not to the assessments of value. The provisions for assessment of the value of lands taken compulsorily are applicable to the lands taken by the Central Control Board in the present case, and the amount must be ascertained in accordance with these provisions.

It was argued on behalf of the appellants that compensation was provided under two Proclamations on March 31, 1915, and August 2, 1915. These Proclamations purport to give compensation not as a legal right, but as an act of grace in cases "not otherwise provided for." Where lands are acquired, as in the present appeal, the case is "otherwise provided for," and, apart from other considerations, the Commissioners have no jurisdiction to entertain an application from the respondents. I desire, however, to enter an emphatic protest against the argument that the private opinion of certain Commissioners, however eminent may be their qualifications, should be regarded as an equivalent for claims made as a matter of right, under the protection of a rule of law, and in accordance with well-established legal principles. It is not necessary in a case of this character to base the decision on any presumption in favour of construing an Act of Parliament so as to give compensation where property is compulsorily acquired for public purposes, but the presumption is too well established to be open to doubt or question. The prerogative of the Crown was referred to in argument, but it is contrary to a principle enshrined in our law, at least since the date of Magna Carta, to suggest that an executive body, such as the Central Control Board, can claim, under the prerogative, to confiscate, for the benefit of the Crown, the private property of subjects.

Bankes L.J. was of opinion that, though the provisions of the Lands Clauses Act were not applicable, the respondents were entitled to be paid the value of the property taken from them, and to recover that value by properly constituted proceedings in a Court of Law. He founded this opinion

on a construction of the statute that there was no statutory right to take land compulsorily unless accompanied by a payment of value, and that if the appellants proceeded to take the premises compulsorily, without furnishing compensation, they were liable to be proceeded against by action for an amount in damages to be assessed in terms of the value of the property taken. My Lords, I think that the Lord Justice has not given sufficient weight to the statutory rights granted by the Legislature to the appellants in the Regulations issued on June 10, 1915. In these Regulations power is given to acquire, either compulsorily or by agreement, premises where the appellants consider that it is necessary or expedient for the proper control of the liquor supply in an area. Where the appellants determine to acquire compulsorily any premises they are required to serve notice of their intention to acquire such premises, and at the expiration of ten days from the service of the notice such premises vest in the trustees of the appellants subject to or freed from any mortgages, rights, and interests affecting the same, as the appellants may by order direct. Assuming that the appellants have taken all the required steps, in accordance with the statutory regulations, they are justified by statutory authority, and no action can be brought against them, rendering them liable for damages in tort. There is no suggestion in the present case that the appellants have not complied with all the statutory directions. In my opinion there is no right of action, and the only remedy open to the respondents is to claim compensation, for which some form of statutory procedure is requisite. The form to be followed in the present case is that of the well-known procedure under the Lands Clauses Acts.

My Lords, in my opinion the appeal should be dismissed with costs.

LORD WRENBURY. My Lords, by Royal Proclamation of March 31, 1915, there was created a Royal Commission of Inquiry to inquire and determine, and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid out of public funds, to persons in respect

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of loss incurred or damage sustained by reason of interference with their property through the exercise by the Crown of its rights and duties in the defence of the realm.

Assuming, but not deciding, that compulsory acquisition of land is included in the words "interference with their property," my observation upon the words I have quoted is that there was at least one case "otherwise provided for," and that was the compulsory acquisition of land in cases falling within the Lands Clauses Act. If there was an undertaking of a public nature within the meaning of the word "undertaking" in that Act, and that undertaking was authorized by an Act passed after 1845 which authorized the purchase or taking of lands for such undertaking, then the Lands Clauses Act was to be incorporated with such Act, and all the clauses and provisions of the Lands Clauses Act, save so far as expressly varied or excepted by the Special Act, were to apply to the undertaking. Such a case, therefore, was excepted from the operation of the Royal Commission.

In that state of facts and on May 19, 1915, was passed the Defence of the Realm (Amendment) (No. 3) Act, 1915. Its purpose was the control of liquor traffic. It gave to His Majesty certain powers. The Act was not, as has been suggested, declaratory of powers exerciseable by Royal Prerogative, but operative in conferring powers which did not otherwise exist. In form it runs "Be it enacted that . . . . His Majesty has power . . . ." and so on; but it is plain that this means "Be it enacted that . . . . His Majesty shall by virtue of this Act have power . . . ." and so on. Thus one provision is that "His Majesty in Council has power to issue regulations under the Defence of the Realm Consolidation Act, 1914, etc." His Majesty cannot by Royal Prerogative have power to issue regulations under an Act of Parliament. The same expression "has power" is used in the Defence of the Realm Consolidation Act, 1914. That Act runs, "Be it enacted as follows (1.) His Majesty in Council has power . . . . to issue regulations . . . . "; and (2.) "Any such regulations . . . . may supersede any enactment." It

must be by statutory authority and not by prerogative that His Majesty can supersede an enactment. The Act of 1915 gave power to make Regulations "for giving the prescribed Government authority power to acquire compulsorily or by agreement . . . . any licensed or other premises. . . . ." Subsequently on June 10, 1915, regulations were made under the authority given by the Act. Art. 6 of the Regulations gave to the Central Control Board (Liquor Traffic) (which was by art. 1 created and made the prescribed Government authority) power to acquire compulsorily or by agreement any licensed premises, and art. 7 contained provisions as to service of notice and as to vesting in the trustees for the Board the premises acquired.

Neither the Act nor the Regulations made under the Act contained any provision for compensation in respect of the premises taken.

I shall come later to the questions whether there was an "undertaking" within the Lands Clauses Act and whether the Control Board are "the Crown," so as to be exempt from the operation of the Lands Clauses Act. Assuming that there is an undertaking, and assuming that the Board are not the Crown, it is my opinion that the case is one which is exempted from the Royal Proclamation of March 31, 1915. The power to take compulsorily raises by implication a right to payment, and that right is neither conferred by, nor governed by, nor in any way affected by the Proclamation. At this date, May or June, 1915, in whom did reside the power to determine what the compensation should be? The answer, I think, is that it resided in the authority to whom it was given by the Lands Clauses Act.

Subsequently, viz., on August 2, 1915, a second Proclamation appointed additional members to the Commission of March, 1915, empowered them to sit in two divisions, varied in some respects not very material a few words in the first Proclamation, and identified the Commission with the operations of the Control Board by the words "through the exercise by the prescribed Government authority of its power under the Defence of the Realm (Amendment) (No. 3)

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Act, 1915." This Proclamation, like the former, contains the words "in cases not otherwise provided for."

It has been urged before your Lordships that the powers of the Control Board extend over a large field, from matters of large moment such as the compulsory acquisition of licensed premises to such things as the hours of business, the prohibition of sale of a particular class of liquor, restrictions on sale, and so on, that the latter are to be dealt with by the Control Board, and that the former ought to go to the same tribunal. It is an argument which shuts its eyes to the words "not otherwise provided for." The true effect of the legislation is that existing rights of compensation are left untouched and that new provision is made for compensation ex gratia when rights are invaded under the legislation, and there is no existing provision for compensation.

My Lords, I do not think it necessary to add anything to what was said in the Court of Appeal upon the contention that the Control Board are for the present purpose to be regarded as the Crown. The contention cannot, I think, be maintained.

Is there, then, here an "undertaking," and by what instrument is it created? My Lords, I cannot follow Bankes L.J. in thinking that the undertaking of the Control Board was brought into existence for the first time by the Regulations of June 10, 1915, as distinguished from the Act of 1915. The Regulations have no independent vitality of their own. They owe their life to those words of the Act of 1915 which give power to issue Regulations. When issued, they form part of the Act from which alone they derive their authority. The language of the Lands Clauses Act is "every undertaking authorised by any Act." It was the Act which authorized this undertaking by giving power by Order in Council to issue the Regulations upon which it depends. The undertaking was defined by the Act. It is the undertaking of controlling the sale and supply of intoxicating liquor in an area, this object to be attained by conferring upon an authority the exclusive power of selling or supplying, or controlling the sale or supply of, intoxicating liquor and acquiring licensed premises and so on.

The decision of Younger J. and of the Court of Appeal, in my judgment, was right, and this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 30, 1919.

Solicitors for the appellants: *Travers Smith, Braithwaite and Co.*

Solicitors for the respondents: *Boulton, Sons & Sandeman.*

[HOUSE OF LORDS.]

INNES OR GRANT (PAUPER) . . . . APPELLANT;

AND

G. AND G. KYNOCH . . . . . RESPONDENTS.

Workmen's Compensation—Accident—Disease—Blood Poisoning—Time of Infection not fixed—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman employed in handling artificial manure, consisting mainly of bone dust, died from blood poisoning caused by his becoming infected through an abrasion on his leg by certain noxious bacilli, which were present in large numbers in bone dust, but were also found in the air and in other substances, though in a much lesser degree. It did not appear when or how he received the abrasion, and it was impossible to say with certainty when the infection occurred. The arbitrator found, as the result of the medical evidence, that the infection which caused the illness was derived from the poisonous germs contained in the bone dust which the deceased handled in the course of his employment, and awarded compensation under the Workmen's Compensation Act, 1906:—

Held (by Lord Birkenhead, Lord Buckmaster, Lord Parmoor, and Lord Wrenbury; Lord Atkinson dissenting), (1.) that the fortuitous alighting of the bacilli upon the abraded spot constituted an accident within the Act, and (2.) that there was evidence upon which the arbitrator was entitled to find that the injury arose out of and in the course of the deceased's employment.

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* *Present:* LORD BIRKENHEAD L.C., LORD BUCKMASTER, LORD ATKINSON, LORD PARMOOR, and LORD WRENBURY.

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The provisions of the Act as to fixing the date of the accident are satisfied if, having regard to the nature of the particular injury alleged, the date of the occurrence of the accident is reasonably fixed, so as to connect the injury with the accident.

Brintons Ltd. v. *Turvey* [1905] A. C. 230 applied.

Decision of the Second Division of the Court of Session in Scotland 1918 S. C. 185 reversed.

APPEAL from a decision of the Second Division of the Court of Session in Scotland recalling the determination of the Sheriff-Substitute of Aberdeen, Kincardine and Banff upon a case stated under the Workmen's Compensation Act, 1906. (1) The appellant, the widow of James Grant, claimed compensation from the respondents in respect of the death of her husband.

The case stated that the following facts were admitted or proved :—

" (1.) The said deceased James Grant for some time prior to the illness which terminated in his death was in the employment of the appellants at their Manure Works, Keith, and his wages were 25*s*. per week.

" (2.) His work consisted in the handling and bagging of artificial manures, which are composed largely or wholly of bone dust.

" (3.) On January 31, 1916, while engaged at his work, the deceased became ill with blood poisoning, from which disease he ultimately died on February 16.

" (4.) Said illness was due to infection by germs known as streptococci and staphylococci.

" (5.) The point of infection was a scratch or abrasion on the skin of the left leg.

" (6.) It was not proved when or how the deceased received the said scratch or abrasion.

" (7.) It was impossible to say with certainty when the infection occurred, though it was probably some days before the deceased became ill.

"(8.) The germs known as streptococci and staphylococci are present in large numbers in the bone dust which the deceased had to handle at his work, but they are also to be found in

(1) 1918 S.C. 185.

decaying matter, in dust, and in the air, although in a much lesser degree. They may be found on the skin and clothes of persons of uncleanly habits.

"(9.) I was satisfied, as the result of the medical evidence, that the infection which caused the illness and death of the deceased was derived from the poisonous germs contained in the bone dust which he handled in the course of his employment, and I so found in fact.

"(10.) The respondent was the only dependant of the deceased, and she was wholly dependent on his earnings."

In these circumstances the Sheriff-Substitute held it proved that the blood poisoning which caused the death of the said James Grant was an injury by accident within the meaning of the said Act, and arose out of and in the course of his employment, and he therefore found the claimant entitled to compensation.

Of the three questions of law stated for the opinion of the Court the second and third were alone material for the purpose of the present appeal.

They were as follows :—

2. Was the blood poisoning which caused the death of the said James Grant an injury by accident within the meaning of the Workmen's Compensation Act, 1906 ?

3. Was there evidence upon which the Sheriff-Substitute was entitled to find that the death of the said James Grant was caused by an injury by accident arising out of and in the course of his employment within the meaning of said Act ?

The Second Division (the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie) answered the third question in the negative and found it unnecessary to answer the second question.

The appeal was originally argued before Lord Buckmaster, Lord Finlay, Lord Dunedin, and Lord Atkinson on January 28, 1919.

1919. March 11. *Macquisten* (of the Scottish Bar) for the appellant. This case is covered by *Brintons Ltd.* v. *Turvey.* (1) The Workmen's Compensation Act itself recognizes that

(1) [1905] A. C. 230.

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personal injury by accident may include disease, for s. 8, which provides for the application of the Act to industrial diseases, expressly saves the right of a workman to recover compensation in respect of a disease to which the section does not apply if the disease is a personal injury by accident within the meaning of the Act. And see *Glasgow Coal Co.* v. *Welsh.* (1) *Steel* v. *Cammell, Laird & Co.* (2) is distinguishable, because it cannot be said that the disease of lead poisoning is contracted at any particular time, and therefore the provisions as to notice in s. 2 cannot be fulfilled. Here the date of the accident, though it cannot be fixed with absolute certainty, can be ascertained within reasonable limits. The accident is the combination of these two facts : (1.) that the man had an abrasion on his leg, and (2.) that the bacillus happened to strike that particular spot. Assuming that this was an accident, it cannot be said that there was no evidence to support the finding of the arbitrator that the injury arose out of and in the course of the employment. The fact that the arbitrator has considered other sources of infection and has deliberately rejected them strengthens his finding, based as it is on the medical evidence, that the infection which caused the death of the workman was derived from the germs contained in the bone dust which he was employed to handle.

Condie Sandeman K.C. and *J. A. Christie* (both of the Scottish Bar) for the respondents.

There are here two questions : 1. Was this an accident? 2. Did it arise out of the employment ? The answer given by the Second Division to the second question is correct, and the first question ought to have been answered in the respondents' favour also. Taking paras. 7 and 8 of the case as stated they do not justify the inference of the arbitrator. It is a matter of guesswork, which is not sufficient. The law is summed up by Buckley L.J. in *Martin* v. *Manchester Corporation.* (3) The respondents accept that a disease may be contracted by accident, but it is for the claimant to show how, when, and where the circumstances took place which

(1) [1916] 2 A. C. 1, 9, 10. (2) [1905] 2 K. B. 232, 236.
(3) (1912) 5 B. W. C. C. 259, 262.

constitute the accident. Here the time cannot be ascertained. At the back of *Brintons' Case* (1) was the idea that there must be some accident apart from the disease, and in that case it was admitted that the injury arose out of and in the course of the employment. Assuming that the arbitrator was entitled to draw the inference he did it may be difficult to distinguish this case from *Brintons' Case* (1), but that is the very point in dispute.

Macquisten replied.

[The following cases were also referred to: *Lyons* v. *Woodilee Coal and Coke Co.* (2); *Broderick* v. *London County Council* (3); *Jenkins* v. *Standard Colliery Co.* (4); *Chandler* v. *Great Western Ry. Co.* (5); *Owners of Ship Swansea Vale* v. *Rice* (6); *Eke* v. *Hart-Dyke.* (7)]

The House took time for consideration.

April 7. LORD BIRKENHEAD L.C. My Lords, the appellant claims compensation under the first section of the Workmen's Compensation Act, 1906, in respect of the death of her husband, James Grant. The section is as follows: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . . be liable to pay compensation."

The facts of the case are compendiously set out in the findings of the arbitrator—the third to the ninth inclusive. These findings must be accepted by your Lordships, unless there was no evidence on which they could be based. The relevant findings are as follows: [His Lordship quoted paras. 3—9 of the case and continued:] The judges of the Second Division of the Court of Session were concerned with two questions of law, stated by the arbitrator for their opinion. A collateral issue raised in the earlier question disappeared. The two surviving questions were the following: "1. Was the blood poisoning which caused the death of the said James Grant an injury by accident

(1) [1905] A. C. 230.
(2) 1917 S. C. (H. L.) 48.
(3) [1908] 2 K. B. 807.
(4) (1911) 5 B. W. C. C. 71.
(5) (1912) 5 B. W. C. C. 254.
(6) [1912] A. C. 238.
(7) [1910] 2 K. B. 677.

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within the meaning of the Workmen's Compensation Act, 1906?" "2. Was there evidence upon which I was entitled to find that the death of the said James Grant was caused by an injury by accident arising out of and in the course of his employment within the meaning of the said Act?" Their Lordships decided on January 19, 1918, that the second question stated above must be answered in the negative, and that it was, therefore, unnecessary to answer the first. The present appeal is brought from that decision.

In my opinion the judgment of their Lordships cannot be supported. I should indeed have thought the matter particularly clear if one of your Lordships had not taken a different view. I am of opinion that the matter is concluded by authority. In *Brintons Ltd.* v. *Turvey* (1) it was held by this House, Lord Robertson dissenting, that the assault of a bacillus upon a workman proceeding from the wool upon which he was working, and affecting him with mortal anthrax, was an accident, and that the consequent and fatal disease was an injury. In that case, therefore, the essentials of the composite phrase "injury by accident" were satisfied. This decision may easily prove with the development of scientific discovery to be one of far-reaching importance. Had your Lordships been invited to reach this conclusion in the absence of authority, I should have given the most anxious attention to the many powerful arguments contained in the dissenting judgment of Lord Robertson. But I am clearly of opinion that *Brinton's Case* (1) does in fact govern the present case. The sequence of incident is a little difficult to describe in precise speech, because the Courts have necessarily applied to infection by microscopically small organisms language which is more commonly used of, and therefore suggests, larger and more material forces; thus the invasion of the bacillus is conceived of as a blow or physical assault. And an interval is assumed (perhaps rightly) before the assault, which is the accident, is followed by the infection or contraction of disease, which is the injury. When *Brintons' Case* (1) was decided the area conceded by contemporary science to idiopathic disease

(1) [1905] A. C. 230, 234.

was much larger than is the case to-day. It follows that the area of disease which is now traced to infection by bacillus has correspondingly grown. The result is that the decision in *Brintons* is likely to increase in range. But no apprehension founded upon these scientific observations can affect our duty to follow the decision when once we are agreed upon its scope. The course of the discussion in the present appeal renders it in my view impossible any longer to contend that the facts of this case can be distinguished from those before this House in the earlier case. Lord Macnaghten (1) enumerated a series of accidental circumstances disclosed by the facts. After mentioning others he added: "It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye." I asked Mr. Sandeman whether it was not equally an accident within the statute that the bacillus in the present case struck the man on an accidental abrasion of the skin. He very candidly, and I think necessarily, admitted that he could draw no distinction between the two cases. He added that he was thrown back upon his submission that there was no evidence justifying finding No. 9 of the arbitrator. Before examining that contention an observation may be made upon the arguments at one time pressed upon your Lordships that, if the findings be supported, every disease which proceeds from bacilli—for instance influenza—must be brought within the statute. It is a partial and perhaps a complete answer to this objection that in proceedings under the Workmen's Compensation Act it is for the applicant to prove his case. He must satisfy the arbitrator that the bacillus infection which is said to constitute the accident invaded his system under such circumstances that the accident arose "out of and in the course of the employment." Where, as in *Brintons*' (1) and the present case, the bacillus is not met with, or is very rarely met with except among the implements or the materials of the particular employment, the onus which is imposed on the applicant is obviously very much lightened. But where the invading bacillus may be found anywhere—in the train, in the home, or in the public-house—a prudent arbitrator will

(1) [1905] A. C. 234.

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require strict proof such as can hardly in the nature of things be often forthcoming that the " accident " in fact arose " out of and in the course of employment."

It will often be necessary to draw inferences, and here the language used by Lord Loreburn in *Owners of Swansea Vale* v. *Rice* (1) should be borne in mind : " What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other." I may add that the decision of the Second Division against the claim was founded on the fact that the particular time and the particular place at which the contact of the abraded surface with the poisonous matter took place cannot be definitely ascertained. It is no doubt the fact that in *Brintons' Case* (2) a particular time was found as being that at which the contact had occurred. But all that is material is that the infection should have been the result of contact at some one particular time and that this one particular time should have been during the course of the employment. Some expressions, such as those referred to in the judgment of the Second Division, have been from time to time used, but none of them are binding upon this House ; and indeed when these various expressions are examined in connection with one another they appear to me to come to no more than this, that it must be established that the disease is due to some particular occurrence, otherwise it cannot be the result of accident. That it should be some particular occurrence happening at some particular time is essential, otherwise it is not in the nature of an accident. What that particular time was is immaterial so long as it reasonably appears that it was in the course of the employment.

It only remains to deal with the contention that there was no evidence sufficient to justify finding No. 9. I am unable to accept that view. Your Lordships were not afforded the convenience of reading the medical evidence, but the arbitrator has made references to its effect, and his successive notes set out on pages 3 to 7 of the Appendix lead me to a clear

(1) [1912] A. C. 238, 239. (2) [1905] A. C. 230.

conclusion upon this point. At page 4 he says: "But the inference which I think must be drawn from the medical evidence is that it is in the highest degree probable that the deceased received the infection from the germs contained in the bone dust and highly improbable that he contracted it elsewhere. This was the opinion of Dr. Taylor and Dr. Smith, who both attended the deceased during his illness, and were, therefore, best qualified to express an opinion on the matter. I do not think it necessary to examine the evidence of the medical witnesses in detail." And he continues in his second note on page 7: "But the medical evidence convinced me that the only reasonable inference to be drawn from the facts was that the deceased had contracted the infection from the material in the appellants' works." In my opinion medical evidence of this kind is exactly the class of evidence which is proper to be brought before an arbitrator. It is his duty, having regard to the fallibility even of instructed medical opinion upon such matters, to weigh it carefully and even critically. If, after having so weighed it, he is convinced by it, he is entitled and bound to say that the appellant has proved his case. I think that the arbitrator in the present case handled the matter with judgment and ability. There was abundant evidence to justify his findings and accordingly I move your Lordships that the appeal be allowed with costs.

LORD BUCKMASTER. My Lords, cases of this kind are always painful to consider and hard to decide. A man is engaged in work, hazardous to health and—it may be—to life itself: disease, followed by a ruined constitution, or even death, may ensue, and yet, so far as the common law is concerned, there is no remedy. Whether any relief is granted by statute is uncertain. The Workmen's Compensation Act of 1906 provided for compensation for personal injury by accident arising out of and in the course of the workman's employment, and s. 8 brings certain diseases within the right to compensation subject to the conditions there set out. The words of the statute have been open to much criticism. Simple as they appear to be, their application to particular

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incidents have been found so difficult that the law reports are full of various decisions, each attempting—and attempting in vain—to provide some fixed canon of interpretation from which a rule can be established for future guidance. The particular case which now arises for consideration shows with what little success these efforts have been crowned. James Grant, the husband of the appellant, was a workman engaged at 25*s.* per week wages in handling and bagging artificial manures. These manures are highly impregnated with the germs known as streptococci and staphylococci. If the defensive barrier of the skin be broken down by abrasion or scratch, these germs find ready access and blood poisoning is set up—only too often with fatal consequences.

James Grant, while engaged at his work, had such an abrasion on his left leg. It is not known how it was caused, and it cannot be related to his employment. Infection took place at this spot and he became ill on January 31, 1916, while engaged at his work, and died on February 16. It is not possible to state within any exact limit of time when the infection actually occurred, but the arbitrator in his special case found the following facts: that the infection, which caused the illness and death, was derived from poisonous germs contained in bone dust, handled in the course of his employment. The question to be answered is this: Was this finding justified and does it show that the injury was due to an accident in the course of, and arising out of his employment?

Death due to disease differs widely from death due to other injury in many obvious respects. The actual occurrence and onset of the illness cannot be stated with the same certainty: the possibility of infection from other sources than the source of infection present at work cannot be overlooked; and the difficulty of bringing these conditions within the common meaning of the phrase "accident" is in itself considerable. These difficulties are illustrated by a series of cases in which similar matters have come before the Courts for decision, and which need examination. It is, I think, right to say that the earliest of these in which infection by hostile micro-organisms was held to be within the statute was the case

in your Lordships' House of *Brintons* v. *Turvey*. (1) In that case a wool sorter died of anthrax, and it was held that his representatives were entitled to recover. It was found as a fact by the county court judge, who awarded compensation, that the disease was caused by the accidental alighting of a bacillus from the infected wool on a part of the deceased's person which afforded a harbour in which it could multiply and grow and so cause a malignant disease and consequent death. It was held that this was an accident because, in the words of Lord Macnaghten, "it was an accident that the noxious thing that settled on the man's face happened to be present in the materials which he was engaged in sorting. It was an accident that this noxious thing escaped the down draught or suck of the fan. . . . . It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye. It must have been through some accident that the poison found entrance into the man's system;" and as this accident caused death, the case was clearly within the statute. The importance of this decision lies in the fact that it included disease within the definition of accident and disregarded the cases that had formerly suggested that the onset of the disease must be the sequel of an accident causing physical injury received in the employment. In *Eke* v. *Hart-Dyke* (2) the Court of Appeal decided that enteritis due to inhalation of sewer gas suffered by a man engaged in work on sewers was not an injury by accident. And in *Martin* v. *Manchester Corporation* (3) it was also held that the contracting of scarlet fever by the porter whose duty it was to clean out the mortuary and attend to the wards of a fever hospital, was again not injury by accident. In *Jenkins* v. *Standard Colliery Co.* (4) and *Chandler* v. *Great Western Ry. Co.* (5) death due to blood poisoning was also held outside the statute. In the former case the decision depended entirely on the consideration of whether the physical injury had been caused in the course of the work, but in the latter the question of the actual

(1) [1905] A. C. 230, 234.
(2) [1910] 2 K. B. 677.
(3) 5 B. W. C. C. 259.
(4) 5 B. W. C. C. 71.
(5) 5 B. W. C. C. 254.

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cause of the disease was discussed and the reasoning is strictly relevant to the present case. A man had injured his thumb away from his work and this injury was the source of the infection. Both Fletcher Moulton L.J. and Cozens-Hardy M.R. were apparently influenced in their conclusion against the claim by the fact that the dirt with which the broken surface would have been brought in contact in the course of the deceased's occupation was not from its nature a probable vehicle for the germs. This reasoning was wholly unnecessary, except upon the hypothesis that had the material been—as it was in the present case—of a poisonous nature, different conclusions might have been reached. Lord Wrenbury, then Buckley L.J., said the cause of the disease was a mere guess.

The facts of these cases are undoubtedly the nearest to those under consideration in the present instance, but there is another series of decisions which also demand attention. In *Glasgow Coal Co.* v. *Welsh* (1) a man contracted rheumatism from standing in water which he had been directed to bale out, and this was held to be an accident within the meaning of the statute. In *Drylie* v. *Alloa Coal Co.* (2) where a miner, on the breakdown of the pumping machinery, was kept standing in water and contracted pneumonia, it was held to be an injury due to accident within the meaning of the statute. And in *Coyle* v. *John Watson, Ltd.* (3) under similar circumstances the same conclusion was reached. Lord Dundas, however, in *Drylie* v. *Alloa Coal Co.* (2) expressed his view that disease was not an accident at all unless it could be definitely collocated in the relation of effect to cause with some unusual, unexpected, and undesigned event arising, at an ascertained time, out of the employment.

I doubt if this careful analysis is sufficient. If, for example, in the case of *Brintons* v. *Turvey* (4) it had been shown that several other workmen had all contracted anthrax, so that the disease could not be described as unusual or entirely unexpected, I cannot think that such circumstance would have destroyed the foundation upon which Lord Macnaghten's opinion was

(1) [1916] 2 A. C. 1.
(2) 1913 S. C. 549.
(3) [1915] A. C. 1.
(4) [1905] A. C. 230, 234.

based. The accident would have been more common but it would still have been an accident. Nor again is it possible to relate with certainty the onset of any bacterial attack to a time ascertained with anything approaching the certainty that attaches to an ordinary physical injury. In the case then under consideration where the pneumonia was strictly traceable to the chill caused at a particular moment, these conditions could possibly be satisfied, but I cannot think they are of universal application, nor, if disease be accepted—as in certain cases, *Brintons* v. *Turvey*, (1) shows that it must—as an accident within the meaning of the statute, can the conditions of decision be formulated by any rigid or unyielding principle. In *Lyons* v. *Woodilee Coal and Coke Co.* (2) Lord Loreburn quotes these dicta of Lord Dundas and adds "that as there are many causes of most events, it" (i.e., the connexion between the work and the disease) "must be a connexion which is not, as a matter of common sense, too remote"; the arbitrator had there found against the claim and his decision was upheld. This statement appears to me to afford some clue for the solution of the problem and helps to apply the decision in *Brintons* v. *Turvey* (1) to the present case. Anthrax, it is true, is a disease of such rare and peculiar nature that it is possible with a certainty, which is denied to more common complaints, to analyse its origin. Blood poisoning, on the other hand, is a comparatively frequent disease, and its sources are manifold; but, when the infection has been found as a fact by the arbitrator to be due to the impregnation of germs acquired by a man in the course of and arising out of his employment, and such a decision is warranted by the facts, "and is not as a matter of common sense too remote," it becomes impossible to distinguish the reasoning that would establish liability, from that used in the case of *Brintons* v. *Turvey*. (1) It was precisely this difficulty that led to Lord Robertson dissenting in that case from the judgment of Lord Macnaghten and Lord Halsbury. But it cannot have been his reasoning—which indeed appears to be unimpeachable—which caused the difference of opinion. It was because the other noble Lords

(1) [1905] A. C. 230. (2) 1917 S. C. (H. L.) 48.

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did not shrink from adopting a course which led to the conclusion which he rejected but which they did not. Just as in the former case Lord Macnaghten regarded the incidence of the anthrax germ as an accident, so, also, it appears to me the incidence of the streptococcus must be regarded in the present case. It was an accident that the germs fell upon the deceased. It was an accident that they came in contact with the abrased surface of his skin, and, from these accidental circumstances, resulted the illness which ended in death.

For these reasons I think that the Court of Session were wrong in rejecting the award of the arbitrator, and I am of opinion that their interlocutor should be reversed.

LORD ATKINSON. My Lords, I regret that I am unable to concur in the judgments which have been delivered. The judgment I am about to read was written after the first hearing. I have not heard anything during the second argument to change the opinion I then formed. The finding of the arbitrator in this case, I think, amounts to this : that the most probable source of the bacilli which caused the blood poisoning of which the deceased died was the bone dust which he was employed to handle and did handle in his daily work. The evidence will not support any conclusion beyond this. It is impossible in the nature of things to say positively at what time these germs enter the human body. They themselves are too minute to be seen, and their movements to be heard or felt. And all that, I think, can be required to bring a case within the statute, as to this point, is a preponderating probability that the workman was infected while he was engaged in doing the work he was employed to do, from a source of infection with which he was brought into contact by that work.

In *Owners of Swansea Vale* v. *Rice* (1), where a seaman's disappearance from a ship at sea was unexplained, Lord Loreburn, in giving judgment, said : " What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one

(1) [1912] A. C. 238, 239.

against the other." It is no doubt true that evidence which is equally consistent with two conflicting contentions or issues is no proof of either. But that, of course, does not apply where there is a preponderance of evidence in favour of one of these contentions as against the other. Moreover, probability itself may vary in degree from what amounts almost to absolute certainty to mere conjecture or surmise. And in the wide scope of the science of bacteriology, by which almost every disease is attributed to the entrance of bacilli into the human organism, anything more than probability cannot, I should think, be attained. Yet the second section of the Workmen's Compensation Act of 1906, identical in terms in this respect with the second section of the Workmen's Compensation Act of 1897, requires that the person injured shall state in ordinary language in the notice he is required to give "the cause of the injury and the date at which it was sustained."

In *Brintons Ltd.* v. *Turvey* (1) I cannot find any indication whatever either in the report of the case in the Court of Appeal or in the report in this House of the nature of the notice given, or whether the evidence was deemed to shew the precise time and occasion upon which the bacillus producing anthrax struck the workman's eye, or invaded his body. From the telling and pointedly expressed judgment of Lord Robertson in that case I should conclude that this was unascertained and unknown. The finding of the county court judge in that case, which, if this be so, must have been based upon probability, was accepted, and the judgment of Lord Macnaghten, so much relied upon, was expressly based upon it. The point, however, was dealt with in the judgment of the Court of Appeal in *Steel* v. *Cammell, Laird & Co.* (2) In that case the workman was paralysed by lead poisoning. His work was that of a caulker, and in the course of it he had to smear with his hands white and red lead over certain rope yarns. Gradually, and as a result of his working with these materials, his system became saturated with lead, either by absorption through the pores of the skin, or by inhalation while using the red lead, which was in powder, or by transference to the

(1) [1905] A. C. 230; [1904] 1 K. B. 328. (2) [1905] 2 K. B. 232.

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intestines while he was eating his meals. On December 19, 1904, he was seized with cramp in his hands, which was the commencement of paralysis due to lead poisoning. Ultimately, he was totally incapacitated for work. Collins M.R. is reported to have said (1): "It is not possible to indicate any precise time at which the mischief arose. It seems to me that the provisions of s. 2 of the Act" (i.e., the Act of 1897) "shew that what is dealt with are cases in which a date can be fixed as that on which the injury by accident came about. I am unable to fix such a date in this case." The headnote of the case states the point of decision thus: "*Held*, that to bring a case within the Act there must be, by reason of s. 2, sub-sec. 1, an injury by an accident of which notice can be given, and that, since it was not possible to indicate a time at which there was an accident which caused the injury to the workman, he was not entitled to an award under the Act." These considerations as to the requirements of this section would appear to me to account for the language used in some of the judgments given in subsequent cases on this point. The judgment of Mathew L.J. in the case contains a passage in reference to the meaning of the word "accident" which is illuminating. It runs thus: "We are told that its use" (i.e., the use of the word "accident") "in popular language must be borne in mind, and the cardinal question will be whether according to the ordinary use of language this particular injury can be said to be accidental. The evidence on this point seems to me to be clear. The man was following a dangerous occupation because it might involve the risk of lead poisoning. But the evidence shews that in the majority of cases the workman would not be affected, though there is a minority in which the injury is sure to arise, and when the lot fell on a particular individual, it could not be said that the case was unexpected or fortuitous or unforeseen. It was certain that somebody would suffer, and this man turned out to be susceptible to the poison. It appears to me that the occurrence was not an accident."

In truth, in one sense, the catching of an infectious disease

(1) [1905] 2 K. B. 236, 237.

is always fortuitous or accidental. There is always an element of chance in it. The fact well known to everybody in his daily experience that if a given number of ordinary persons be at the same moment, and under the same external circumstances, brought into contact with the same source of infection, some of them will catch the disease, while others will escape it, proves this. But it was contended by Mr. Sandeman on behalf of the respondents, with his usual brevity and precision, that the accident involved in catching disease from any source of infection with which a workman is brought into contact in his employment will not satisfy the words "injury by accident" contained in the Act of 1906; that, on the contrary, the "accident" to satisfy these words must be one which brings the workman into contact with the source of infection. By way of illustration he took the case of a hospital nurse employed in a hospital where persons suffering from a most infectious disease, scarlet fever, are admitted as patients. She is employed to tend these patients. Her duties bring her daily and hourly into contact with sources of infection. She deliberately, and presumably with full knowledge of the danger, runs the risks attending the discharge of these duties, hoping, possibly, to escape the consequence, but sooner or later she catches the disease. That event could not well be described as unforeseen or unexpected. And according to Mr. Sandeman's contention it would not be an "injury by accident" within the meaning of the statute. In support of this contention he cited several authorities, the following amongst others: *Broderick* v. *London County Council.* (1) In that case the workman contracted enteritis by inhaling sewer gas in the course of his employment in sewers in which he was by the defendants hired to work. The county court judge found that it was an incident of his employment that noxious gases should be present in the atmosphere in which he worked, and that the work therefore involved the risk of his being poisoned by such fumes, so that the result could not be said to be unexpected or fortuitous, or unforeseen, but was a result which might be caused to anyone engaged in such work. The medical evidence

(1) [1908] 2 K. B. 807.

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was to the effect that this disease was usually caused by some irritant entering the system, usually in the nature of a bacillus. It was held that the contracting of the disease was not "a personal injury by accident," within the meaning of s. 1 of the Workmen's Compensation Act of 1906. And it was pointed out that it had been laid down in *Fenton* v. *Thorley & Co.* (1) that that case did not involve the doctrine that all diseases contracted by a workman in the course of his employment were to be regarded as accidents within the meaning of the statute.

In *Martin* v. *Manchester Corporation* (2) the workman was a porter in a fever hospital and part of his duty was to clean out the mortuary with cold water and attend in the fever wards. In February, 1910, he had an attack of influenza which necessitated his leaving work. He returned on March 22. He cleaned out the mortuary on April 1, in which it was not proved there was any dead body. After working about an hour he felt sick and dizzy. On the 2nd he felt worse and had a sore throat. On the 5th he got sick leave and developed scarlet fever, which totally incapacitated him for seven weeks. The doctor proved that scarlet fever took from four to seven days to develop. The county court judge found that the workman contracted fever on April 1, and that this was an injury by accident arising out of and in the course of his employment. It was held by the Court of Appeal that there was no evidence to support that finding. Buckley L.J. as he then was, in delivering judgment, said: "The contraction of the disease is an injury. That injury may or may not be by accident. In order that the man may succeed it is necessary he should shew that the disease was contracted by accident. . . . . The workman must show how, when, where, to the satisfaction of the tribunal, the circumstances took place which constitute an accident. The most that can be said here is that this man was employed in a scarlet fever hospital, and it may be more probable that he contracted the complaint in the place where there were scarlet fever patients than in the street or his aunt's house. But that will not do." He

(1) [1903] A. C. 443, 448. (2) 5 B. W. C. C. 259, 262.

then proceeds : " Even if he contracted it in the hospital, it is not enough, because you must show that he contracted it by accident."

In the case of *Eke* v. *Hart-Dyke* (1) the deceased workman was employed as a gardener, labourer and caretaker by the defendant at East Hall, Orpington, Kent. In July, 1909, he was ordered by his employer to open certain cesspools for inspection. He did so, and was engaged four or five days in that work. Early in August he got unwell. In September he was found to be suffering from poisoning by sewer gas. And on October 30 he died from ptomaine poisoning by sewer gas inhaled or absorbed into his system. In this, as in the last case, it was held by the Court of Appeal that the element of accident was absent and that therefore the claimant could not recover. Kennedy L.J., referring to *Brintons* v. *Turvey* (2), said, " According to the judgment of the House of Lords, if you can prove that on a particular day, though nobody saw it, a particular bacterium from the wool struck his " (the workman's) " eye, because his eye was afterwards found to be diseased, that is an accident. It is not easy, I think, to draw a clear line of distinction between that and what might, I think, have been found here, on the medical evidence, that the death was due to toxin poisoning which got into his body on one or other of the particular occasions on which the deceased worked in the cesspools. I agree, however, that in supporting the judgment of the county court judge we should be going rather further, as the findings stand, than any judgment that has yet been given has gone in regard to what constitutes an accident. As it stands, I cannot find any authority that would justify us in upholding this judgment, although, for reasons which Lord Robertson indicates in *Brintons, Ltd.* v. *Turvey* (2), I feel, speaking for myself, that it is difficult to distinguish such a case as the present from the case with which the Courts had there to deal." I confess I feel myself in the like difficulty. To a like effect are the decisions as to the diseases of " beat hand " and " beat knee " contracted by a gradual process in the course of more or less prolonged work as in the cases of

(1) [1910] 2 K. B. 677, 688. (2) [1905] A. C. 230.

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Marshall v. *East Holywell Coal Co.* (1); *Gorley* v. *Backworth Collieries Co.* (2); *Walker* v. *Hockney Brothers.* (3)

In the present case all that appears from the findings of the arbitrator is that the deceased was for some time, he does not say how long, prior to the illness which terminated in his death, employed on the respondents' manure works handling and bagging artificial manure, wholly or largely composed of bone dust; that in this bone dust noxious bacilli of a certain kind are found in large numbers, but are also found in lesser numbers in decaying matter, in dust (presumably other than bone dust), in the air, and on the skin and clothes of unclean persons; that the deceased took ill on January 31 and died on February 16 following. He further finds that he was satisfied on the medical evidence that the noxious germ falling upon a scratch or abrasion on the left leg of the deceased infected him and caused the illness of which he died. But then he finds that it is impossible to say with certainty when the infection occurred, though it was probably some days before the deceased became ill. Now on these findings it would appear to me to be very difficult, if not impossible, to state in the notice required to be given the date at which the injury was sustained, unless it be sufficient to state the probable date within limits, and second, it is clear that to come in contact with the most prolific source of infection was part of the duty of the deceased which he was employed to discharge.

Some assistance may, I think, be derived from those recent cases, in which the contracting of a disease was held to be an "injury by accident" entitling the sufferer to compensation in order to see in what the fortuitous or accidental elements consisted. In *Drylie* v. *Alloa Coal Co.* (4), owing to a breakdown of a pump, the water in a mine had accumulated so that the workmen had to stop work. They went to the shafts to ascend, and were kept there twenty minutes up to their knees in cold water, the cold air descending upon them. This abnormal exposure gave to the deceased a chill which set up the disease of pneumonia of which he died. His death was

(1) (1905) 7 W. C. C. 19.
(2) (1905) 7 W. C. C. 19.
(3) (1909) 2 B. W. C. C. 20.
(4) 1913 S. C. 549, 554.

held to have been caused by "an injury by accident" within the meaning of the Act of 1906. An effort was made to show that the accidental breakdown of the pump though it may have been the remote cause of the injury was not the proximate cause of it. Lord Dundas, in delivering judgment, said: "The circumstance of Drylie finding himself immersed to the knees in icy-cold water was abnormal; it, in its turn was, as matter of fact, due to an abnormal cause—the stopping of the pump while men were at work in the pit; and, if the pneumonia of which he died was in fact caused by his immersion, I think the elements of an 'accident' are here present." In *Coyle* v. *John Watson, Ltd.* (1), the decision in *Drylie's Case* (2) was approved of and adopted. In the former case the shaft of pit No. 2 in which the deceased was working was wrecked. The deceased and his fellow-workmen were ordered to ascend by the shaft of pit No. 1, this being the downcast shaft which ventilated the mine. They were kept waiting at a mid-landing for an hour and a half until those who usually ascended by that shaft had been raised. The first-mentioned lot of men, including the deceased, were thereby exposed to a cold down draught. As the result of this exposure, the deceased got a chill which brought on pneumonia, of which he died. It was held that the death resulted from the exposure consequent on the wreck of shaft No. 2; and that there was evidence to support the finding of the arbitrator that the deceased sustained an "injury by accident" arising out of and in the course of his employment. Lord Dunedin, in giving judgment, referring to *Drylie's Case* (2), said: "It seems to me that here, as there, you have an accident interfering with the normal working of the mine, a consequential exposure of the workman to rigorous climatic conditions for a prolonged period, which exposure would not have been his fate but for the accident, and a finding in fact that the supervening illness was due to this prolonged exposure. There is no intervening circumstance depending on some cause other than the accident which occurs to break that chain of causation."

On the other side of the line is the case of *Lyons* v. *Woodilee*

(1) [1915] A. C. 15. (2) 1913 S. C. 549, 554.

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Coal and Coke Co. (1) There, a workman employed in a coal mine finished his work and went to the bottom of the shaft at a time when he knew the statutory daily inspection was taking place. This inspection varied as to the time necessary to make any repairs required, but the cage usually took half an hour to descend. On this occasion, owing to a breaking of the bell wire, the cage occupied an hour in descending, during which time the workman stood in a cold current of air and contracted a chill which developed into pneumonia of which he died. The arbitrator found that the workman's decease was not an "injury by accident" arising out of and in the course of his employment. It was held, affirming the First Division, that the decision of the arbitrator was such as on the evidence he was entitled to make. Lord Loreburn on delivering judgment said: "Now, in order to succeed, an applicant must show that there was an accidental occurrence or condition, something unlooked for, some unlooked-for mishap, or untoward event which was not expected or designed; but he must also show that the injury was connected with it and consequent upon it; and as there are many causes of most events it must be a connexion which is not, as a matter of common sense, too remote." In this judgment the other members of the House concurred. It is easy to detect the accidental element in these latter cases. They are relied upon to establish, and, I think, do establish that that element must not lie in the mere catching of the disease, but in bringing the workman into contact with the source of infection. I think the fair conclusion from them is that but for the accidental injury to the mine or its machinery or the action of the latter, the decisions in those cases would have been the other way.

In *Glasgow Coal Co.* v. *Welsh* (2) a man employed as a brusher in a mine was directed by the owners of the mine to bale out a large quantity of water which had accumulated at the pit's bottom, owing to the breakdown of a certain pump which had occurred four or five days earlier. The work necessitated the workman's standing up to his chest in water. He did not object to do this work. There was no evidence that he did not know

(1) 1917 S. C. (H. L.) 48. (2) [1916] 2 A. C. 1, 2, 4.

what its nature was. He was engaged at it for eight hours, with the result that he contracted sub-acute rheumatism. In the body of the report it is stated that the Sheriff Substitute found in law that this was an injury caused by accident arising out of and in the course of the respondent's employment. That is a question of law once certain facts are admitted or found. Lord Lindley in *Fenton* v. *Thorley & Co.* (1) pointed out this very clearly. He said: "When personal injury and its cause or causes have been ascertained the question whether such cause or causes amount to an accident within the meaning of the Act is a question of law on which the decision of the county court is not final." In the headnote it is stated that the arbitrator found that the rheumatism was caused by the extreme and exceptional exposure to cold and damp to which the man was subjected on the occasion in question. If that be an accurate statement of the finding it would, I should think, commend itself to the common sense of anyone. There are few ways, I should think, of contracting rheumatism more certain and effectual than by standing up to one's chest in cold water for eight hours. It would appear to me to be a natural result of such an act. The difficulty in the claimant's case was to show that when this was done deliberately and willingly by a workman, who, presumably, was possessed of the ordinary intelligence of a human being, the catching of the disease was an injury by accident. Lord Kinnear leaves no doubt as to how he regards the finding: "The finding which I take to be conclusive is 'that the rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question.'" Lord Kinnear then proceeds: "I agree with my noble and learned friend that the Sheriff-Substitute cannot be said to have misconstrued the statute when he found, farther, that 'this was an injury by accident arising out of and in the course of his employment.'" He cited *Fenton* v. *Thorley & Co.* (2) in which Lord Macnaghten is treated as having given a definition of "accident" applicable in all cases, which in *Clover, Clayton*

(1) [1903] A. C. 443, 453. (2) [1903] A. C. 443.

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& Co. v. *Hughes* (1) he asserted he neither gave nor intended to give, and Lord Kinnear apparently considered that this definition applied to the matter in hand, although, in *Fenton's Case*, the workman while making a sudden and very forcible effort to turn a wheel ruptured himself, thus inflicting the injury on himself, never thinking or foreseeing or expecting he would do so, while here the immersion was deliberate. At page 6 he said that the connection between the injury and the bursting of the pipe was too remote. Lord Haldane, after referring to the finding of the arbitrator, as Lord Kinnear had cited it, said: "In order to make out his claim under the Workmen's Compensation Act, 1906, a workman must prove that there was 'personal injury by accident arising out of and in the course of the employment.' The finding of the arbitrator, who was in this case the Sheriff-Substitute, is made conclusive as to whether he has done so, unless there was on the face of the award error in law, or unless there was no evidence to support it. In the present appeal it is clear that it must be taken that the arbitrator found conclusively that there was injury due to an event arising out of and in the course of the employment. The one question is whether, reading the award as a whole, this event could be in point of law an accident within the meaning of the Act, for if so the arbitrator certainly had before him evidence upon which he could find that it had happened. On the question so remaining I think that the judgment in this House in *Fenton* v. *Thorley & Co.* (2) is conclusive. If the definition of accident within the meaning of the Act is 'an unlooked-for mishap or an untoward event which is not expected or designed,' as stated by Lord Macnaghten, it covers the present case." Lord Haldane then goes on to state in what, as I understand him, the "accident" consisted. He said "I interpret the finding of facts as amounting to this: that there was an entry into the cold water and prolonged exposure to it, the effects of which, being miscalculated, proved unexpectedly injurious. . . . . Indeed, it is plain that he went into the water to bale it out of the pit under directions from his employer, and he

(1) [1910] A. C. 242. (2) [1903] A. C. 443.

does not appear to have entertained such apprehensions of danger to himself as to induce him to disobey those directions. Had he died suddenly while so exposed, say of heart disease caused by the shock, there can be no doubt that this would have given a title to his dependants to claim on the footing of injury from accident. I am unable to see why a claim in respect of a less serious mishap should be excluded by the circumstance that the miscalculated action of entering the water took time to produce its consequences. This miscalculated action of entering the water in the present case must be taken to have constituted a definite event which culminated in rheumatic affection. It was the miscalculation which imported into that event the character of an accident within the meaning of the Act." The other noble Lords apparently concurred in this view. It would appear to me that according to it the fact that the nature of the consequence of an act deliberately done by a workman, even though it should be the natural consequence of the act does not affect the question. It is rather the state of mind of the sufferer which determines whether the event is to have an accidental character or not. If he be so dull and unimaginative as not to foresee the natural consequence of the "event" then the "event" has an accidental character. If he knows the "event" to have dangerous consequences, but through miscalculation runs the risk of encountering them, hoping and expecting to escape, the event will still have an accidental character. I cannot but think that the observation made by Lord Macnaghten in *Fenton* v. *Thorley & Co.* (1), if considered, as it ought to be, in connection with the facts to which it related, gives no support whatever to the proposition that the natural consequence of an act done by any individual, deliberately, becomes an accident, because, though he knows there are some risks attending the doing of it, he miscalculated the gravity of those risks. The heart disease from shock to which Lord Haldane refers would not appear to me (there is no evidence on the point) to be the natural result of an act such as that of the claimant.

My Lords, there is no doubt that every decision of this House,

(1) [1903] A. C. 443.

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in the exercise of its appellate jurisdiction, on points of law is prima facie binding on the House, and that it is the duty of every one of its members loyally to accept and apply that decision; but, if two decisions of the House be in conflict and absolutely irreconcilable the one with the other, one cannot, in the nature of things, accept and act upon both of them. I confess, with regret, that I am entirely unable to reconcile the decision in the last-mentioned case with the decisions in *Drylie's Case* (1) (approved of by the House), in *Coyle* v. *John Watson, Ld.* (2), and in *Lyons* v. *Woodilee Coal and Coke Co.* (3) In each of these latter cases it was held that an "accidental" character was given to the injury sustained by the workman by the fact that an accident to the machinery of the mine in which he worked, or to the mine itself was a mediate or immediate, but an effective cause of that injury, and that but for these accidents to things external to the workman himself his injury would not have acquired an accidental character. In *Glasgow Coal Co.* v. *Welsh* (4) nothing of that kind occurred. There was no accident in that case to anything external to the workman himself which was an effective cause, mediate or immediate, of the injury he sustained. I cannot find, therefore, that this decision affords any help to the decision in the present case. The arbitrator does not find here that the abrasion, which he finds was the point of infection, was inflicted upon the workman by the doing of his work in the respondents' factory, nor even while he was in that factory. The medical evidence upon which he bases his finding as to the "point" of infection is not given. There is nothing in the findings, or in the facts stated to have been proved, to show whether this scratch was exposed, as was the workman's eye in *Brintons* v. *Turvey* (5), or was covered and protected by the workman's clothes. Lord Macnaghten in that case points out that "the medical evidence seems to be that without some abrasion infection" by the anthrax bacillus "is hardly possible," and he treats

(1) 1913 S. C. 549.
(2) [1915] A. C. 1.
(3) 1917 S. C. (H. L.) 48.
(4) [1916] 2 A. C. 1.
(5) [1905] A. C. 230, 232.

the fact that the bacillus struck the man "on a delicate and tender spot in the corner of his eye" where there was no abrasion and thus entered his system as in itself one of the accidents in the chapter of accidents which he describes. The workman had not, therefore, upon his body any spot which, according to the usual course of things, would be a point of attack for such bacilli. His shield against them was, according to medical opinion, almost complete. The one spot and the only spot in which he was vulnerable was the tender corner of his eye. It was treated as an accident that the bacillus hit that spot. These bacilli known as streptococci and staphylococci are found in the air. It is, I think, impossible to suppose that they did not exist in considerable numbers in the atmosphere in which this bone dust so full of them was handled by the deceased. The medical evidence not being given, one cannot know whether or not it was proved that these bacilli can or cannot gain access to the human body, so as to infect it, by the very act of breathing an atmosphere polluted by their presence. If the workman having this abrasion upon his skin, whether he knew of its existence or not, came deliberately to work with this bone dust, in an atmosphere thus polluted, possibly to a great extent, but at all events to some extent, the present case, save for one feature, resembles the cases of *Broderick* v. *London County Council* (1) and *Eke* v. *Hart-Dyke* (2) in both of which it was shown that the gas which the workman had necessarily to breathe while at his work was noxious. The one distinguishing feature in these cases was that the poisonous effect of the gas was probably continuous and gradual, while the successful infection by the bacillus was a single occurrence, possibly a sudden occurrence. I cannot bring myself to think that this latter circumstance is sufficient to make the injury to the deceased in the present case accidental in character. There is another circumstance distinguishing this case from *Brintons* v. *Turvey*. (3) There the workman was evidently employed to work with wool purified from microbes, or designed or attempted to be purified from them, by

(1) [1908] 2 K. B. 807. (2) [1910] 2 K. B. 677.
(3) [1905] A. C. 230, 232.

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artificial means, the downdraughts caused by the working of a fan. The wool was the only source of the microbe. The second accident in the chapter of accidents described by Lord Macnaghten is the escape of the noxious bacillus from the draught of the fan, which the Board of Trade required to be used for disinfecting Eastern wool. The first accident in the chapter is, he says, "that the noxious thing which settled on the man's face happened to be present in the materials which he was engaged in sorting." I think he must have been here referring to the wool after it had been submitted to the purifying process, for on referring to the report of the case in the Court of Appeal (1), I find it stated that the wool came from Persia and was, like other wool coming from the East, liable to be infected with the bacillus of anthrax. Indeed, the requirement of the Board of Trade is only explicable on that ground. I have not succeeded in finding any case in which it has been suggested, much less decided, that from the mere fact that a workman having a scratch upon him, possibly covered, has probably been infected by a bacillus, probably coming from the matter he was employed to handle, but possibly coming from some other source, lighting upon this scratch, the illness supervening on that infection can legitimately be held to be an injury by accident within the meaning of the Workman's Compensation Act. In the absence in the present case of the medical evidence, and having regard to the loose and unsatisfactory manner in which I think the miscalled findings Nos. 7 and 8, if not the finding No. 9, have been framed, I am not satisfied that the applicant has discharged the burden of proof resting on her or that the decision appealed from was erroneous. I think, therefore, that the appeal should be dismissed.

LORD PARMOOR (read by LORD BUCKMASTER). My Lords, the appellant is the widow of James Grant, who prior to his death was in the employment of the respondents at their manure works, Keith. On January 31, 1916, the deceased became infected with germs known as streptococci and staphy-

(1) [1904] 1 K. B. 328.

lococci, and died of blood poisoning on February 16. The point of infection was a scratch or abrasion of the skin on the left leg. There was no proof how or where the deceased received the said scratch or abrasion. The germs known as streptococci and staphylococci are present in large numbers in the bone dust which the deceased had to handle at his work, but they are also to be found in decaying matter, and in the air in a much less degree. They may further be found on the skin and clothes of persons of uncleanly habits. The arbitrator found that although it was impossible to say with certainty when the infection occurred, he was satisfied, as the result of the medical evidence, that the infection which caused the illness and death of the deceased was derived from the poison germs contained in the bone dust, which the deceased handled in the course of his employment, and found that the appellant was entitled to compensation.

Three questions of law were left for the opinion of the Court. The first and second were not argued in this House. The third "Was there evidence upon which I was entitled to find that the death of the said James Grant was caused by an injury by accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906?" was answered in the negative in the Court of Session. It has been decided in this House in the case of *Brintons, Ltd.* v. *Turvey* (1) that an accident which causes injury in the shape of disease, if it arises out of and in the course of his employment, entitles a workman to compensation under the Workmen's Compensation Act. In all cases an accident is a necessary factor, but, if an accident causes injury in the shape of a disease, it does not thereby alter its essential character, and the resultant injury is subject-matter for compensation. Whether an injury, in the shape of disease, is the result of an accident will depend on the circumstances of the particular case, provided that the assessing tribunal places the right meaning on the word "accident" and in other respects follows the directions of the Workmen's Compensation Act. I think therefore that in the present appeal, and in order to

(1) [1905] A. C. 230, 238.

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answer the question of the arbitrator, it is necessary to see whether the arbitrator did give the right meaning to the word "accident" as used in the Workmen's Compensation Act, and secondly whether, if the arbitrator did rightly construe the Act, there was evidence on which the arbitrator was entitled to find that the death of James Grant was caused by injury resulting from such accident. On the first point the arbitrator in my opinion did apply, as it was his duty to do, the decision in this House in the case of *Fenton* v. *Thorley & Co.* (1) a decision followed and approved in the case of *Brintons* v. *Turvey.* (2) In the latter case Lord Lindley said "The meaning of the word 'accident' as used in the Workmen's Compensation Act was settled by this House in *Fenton* v. *Thorley & Co.* (1)," and in my opinion this House and all other tribunals are bound to follow the decision. The decision is contained in Lord Macnaghten's judgment: "I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." The arbitrator therefore had in the first place to determine whether the disease from which the deceased died can properly be said to have resulted from an unlooked-for mishap, or untoward event, which is not expected or designed. Personally, I cannot doubt that there was evidence on which the arbitrator could find in favour of the claimant, adopting this test as he was bound to do. There is certainly medical evidence that it is in the highest degree probable that the deceased received the infection from germs contained in the bone dust, and highly improbable that he contracted it elsewhere. This was the opinion of Dr. Taylor and Dr. Smith who both attended the deceased during his illness and were therefore best qualified to express an opinion on the matter. An issue of this character is necessarily one of probability, more or less, but it is impossible to say that, when a finding of fact is made on the balance of relevant probabilities, there is an absence of all evidence on which an arbitrator may competently base his finding. No one doubts that it is necessary for a claimant to establish

(1) [1903] A. C. 443, 448. (2) [1905] A. C. 230.

his case, but if there is evidence on which it is competent for the arbitrator to decide, then the decision is within his jurisdiction, and not a matter of law for any Court of Appeal. In a further note the arbitrator states "But the medical evidence convinced me that the only reasonable inference to be drawn from the facts was that the deceased had contracted the infection from the material in the appellants' works." Therefore if there was an accident it was an accident arising out of and in the course of employment which resulted in the death of the deceased. The arbitrator refers to the case of *Brintons* v. *Turvey* (1) as an authority that the contracting of a germ disease may be an accident within the meaning of the Workmen's Compensation Act, and I am unable to see that he in any way misapprehended the decision of this House. He states his view that it was essential for the pursuer's case to prove that the fortuitous intrusion of the noxious germs occurred in consequence of the employment in which the deceased was engaged, and, when this happens, I cannot understand the argument that there is not an untoward event which is not expected or designed.

My Lords, I am unable to agree in the judgment of the Lord Justice-Clerk that it is material, to establish the claimant's case, to prove where or when the deceased injured his leg. It is not suggested that the deceased was not in a fit state to go to his work, and further inquiry is not material or justifiable. The detailed opinion of Lord Dundas requires careful examination. With all respect to his Lordship, I think that the earlier portion of his judgment, in which he states that he is far from clear that the finding in fact that the infecting germs came direct from the bone dust to the scratch, in course of handling, was warranted by the facts of the case, is in effect a consideration directed rather to the weight of evidence, than to whether there was any evidence on which the arbitrator might competently act, and in these cases the inquiry should be confined within the narrower limits, in order to avoid any tendency towards an assumption of jurisdiction. The second portion of his Lordship's judgment is based on the assumption that

(1) [1905] A. C. 230.

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though the claimant might be entitled to compensation as having established an accident and an injury, the time and circumstances of the alleged injury remained in obscurity, and that this by itself was fatal to the claim. In support of this proposition he refers to the case of *Eke* v. *Hart-Dyke*. (1) It is not necessary to refer to the special facts in this case. There is no question that there must be a finding of fact that there is an accident in order to entitle a claimant to succeed in the claim for compensation under the Act, but the learned Master of the Rolls stated in the course of his judgment "Unless the applicant can indicate the time, the day, and circumstance, and place, in which the accident has occurred by means of some definite event, the case cannot be brought within the general purview of the Act, and does not entitle the workman or his dependants to compensation." Farwell L.J. expresses his agreement with the Master of the Rolls, but Kennedy L.J. gives his decision on somewhat different grounds, and gives no sanction to the proposition that, although an accident has in fact occurred which has brought about the injury for which compensation is claimed, an applicant is not entitled to succeed unless he can indicate the exact time and day and circumstance and place in which the accident has occurred. There are some accidents in which such particularity would not be practicable. I am unable to draw any distinction between an accident which has been proved to have occurred at a particular hour on a particular day, and an accident in reference to which the particular hour or day cannot be established, but which certainly is proved to have occurred within some narrow limitation of time. The question is not so much the minute particularity of the occurrence, as the existence of competent evidence on which the arbitrator may find the causal connection between the accident and the injury. The passage from the judgment in *Drylie* v. *Alloa Coal Co.* (2) to which Lord Dundas refers does no more than emphasize the recognized principle that, unless the disease which caused death is the result of an accident, compensation cannot be claimed under the Workmen's Compensation Act.

(1) [1910] 2 K. B. 677, 684. (2) 1913 S. C. 549.

My Lords, in my opinion the interlocutor appealed from should be reversed and the award of the arbitrator affirmed with costs here and below.

LORD WRENBURY (read by LORD ATKINSON). My Lords, this case in my judgment involves no new or difficult question of law. In the absence of the evidence (none of which is before us) the difficulty lies in applying the law to the facts, for it is not easy to say what were exactly the facts found. The man suffered personal injury, for he contracted a disease and it resulted in his death. Did he suffer that personal injury by accident? And if so did that accident arise out of and in the course of his employment? The arbitrator found both of these in the affirmative. The Court of Session allowed an appeal. The workman appeals.

For the purposes of the Act an accident is not something without which the personal injury would not have resulted, but something in consequence of which personal injury did result. If the man had not come to work on the day in question—if he had not sat at the bench at which he did sit, and so on, the injury would not have been sustained. But although colloquially it may be said that it was an accident that he sat at that bench and so on, yet such events are, of course, not accidents within the meaning of the Act. The accident must be an untoward event which results in the injury. It must be something positive not negative; something active not passive. Thus in the present case the abrasion on the man's leg was something in the absence of which it may well be that he would not have contracted the disease, but it was not an accident within the Act that he had an abrasion on his leg. The question is whether he—being such as he was, namely, a man with an abrasion on his leg—suffered this injury (namely, contracting a disease) by accident.

Another point which I wish to put for the purpose of excluding it, is the following. If an infectious disease is prevalent—or to put the point more closely, if the employment be in a place (say a fever hospital) where exposure to infectious disease is inevitable—some persons will take it, and others will not.

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In one sense the catching of the disease will be fortuitous or accidental. But the one who does take it will not within the statute contract the disease by accident. As regards any particular person the event may happen or may not, but the happening is not an accident within the Act, it is the result of the fact that the particular person attacked was a particular sort of person, namely, one susceptible to infection. *Broderick* v. *London County Council* (1), *Eke* v. *Hart-Dyke* (2), and *Martin* v. *Manchester Corporation* (3) are cases upon this point. It is necessary therefore in the present case to look for the particular cause from which it resulted that this man, being such as he was, suffered, at a date which can in some sense be stated, personal injury by an untoward event. I take the words "cause" and "date" from s. 2 (2.) of the Workmen's Compensation Act, 1906. I have to find some occurrence which is accidental and is extraneous to the disease itself from which the disease resulted, and that occurrence must be referable to the employment, and I must be able in a reasonable sense to fix the date at which the "accident" happened. *Jenkins* v. *Standard Colliery Co.* (4), *Wood* v. *Davis & Sons* (5), and *Chandler* v. *Great Western Ry. Co.* (6), are all cases in which the workman failed because his evidence established at most that the admitted cause of the disease was probably one which operated in and in the course of the employment. He was bound to go beyond that and to shew not that it might have operated—but that it did operate—in and in the course of the employment.

My Lords, having said this much I turn to the findings of the arbitrator and the questions stated in the special case for the opinion of the Court. The special case states, and it would seem confuses, facts which were admitted or proved, and findings of the arbitrator upon the facts. Of the questions stated the only one which the Court of Session found it necessary to answer was the third and that was in the following terms. "3. Was there evidence upon which I was entitled to find

(1) [1908] 2 K. B. 807.
(2) [1910] 2 K. B. 677.
(3) 5 B. W. C. C. 259.
(4) 5 B. W. C. C. 71.
(5) (1911) 5 B. W. C. C. 113.
(6) 5 B. W. C. C. 254.

that the death of the said James Grant was caused by an injury by accident arising out of and in the course of his employment within the meaning of said Act?" That question the Court of Session answered in the negative. But the astonishing thing is that the evidence to which the question is addressed is not before this House, and so far as appears was not before the Court of Session. All that we have are the ten paragraphs in which, as I have said, the case states, and it seems to me confuses, facts admitted or proved and findings based on those facts. Para. 7 states that "it was impossible (meaning impossible upon the evidence) to say with certainty when the infection occurred, though it was probably some days before the deceased became ill." Para. 8 states that the infectious germs are present in large numbers in the bone dust which the deceased had to handle, but they are also to be found elsewhere and may be found on the skin or clothes of persons of uncleanly habits. Para. 9 follows these and would seem to be based upon them and is a finding of fact. It is to my mind most unsatisfactory. It finds that the infection was derived from the germs contained in the bone dust which the man handled in the course of his employment, but not that it arose in the course of his handling it in his employment. It does not find that the infection (which para. 5 states as a fact was in the abrasion in his leg) was caused when he was at work—and in fact seeing that the basis of the finding is the medical evidence, it cannot be that the evidence referred to was likely to contain anything on that point. On the other hand the third question must, of course, be read as meaning "was there evidence upon which as matter of law I was entitled to find injury by accident arising out of and in the course of the employment?" and the parties have not before your Lordships raised the question that there was no evidence upon which the arbitrator could find as he did find. So reading the question, I think that para. 9 may be said to amount to a finding that as matter of fact the injury arose by the accident that the germs found the weak spot in the abrasion on the leg, and (although I think this much more doubtful) that that happened in the course of the employment. If this be so *Brintons Ltd.* v. *Turvey* (1),

(1) [1905] A. C. 230.

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which of course binds your Lordships, is, I think, in point.

As regards the point that the appellant has failed to fix the date at which the accident happened, I think the Act is satisfied in that respect if, having regard to the nature of the particular injury alleged, the date of the occurrence of the accident is reasonably fixed so as to connect the injury with the accident. Upon this para. 7 is far from satisfactory, but I do not say it is necessarily insufficient.

Upon the whole I am not prepared to differ from the majority of your Lordships when you arrive at the conclusion that the appeal succeeds.

Interlocutor of the Second Division of the Court of Session in Scotland reversed, and interlocutor of the Sheriff-Substitute of Aberdeen, Kincardine and Banff restored. The respondents to pay the costs of the action in the Court of Session and also the costs of the appeal to this House, such last-mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords Journals, April 7, 1919.

Agents for the appellant: *D. Graham Pole, for Sharpe & Young, W.S., Edinburgh.*

Agents for the respondents: *Kenneth Brown, Baker & Co., for William Oliver, Solicitor, Hawick, and Steedman, Ramage & Co., W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)*
1919
May 19.

LES AFFRÉTEURS RÉUNIS SOCIÉTÉ ANONYME . . . . . } APPELLANTS ;

AND

LEOPOLD WALFORD (LONDON), LIMITED . . . . . } RESPONDENTS.

Ship—Charterparty—Chartering Broker's Commission—Custom.

A clause in a time charterparty provided that "a commission of three per cent. on the estimated gross amount of hire is due to Leopold Walford (London), Limited, on signing this charter (ship lost or not lost)." No hire was in fact earned under the charterparty:—

Held (1.), that the charterers, as trustees for the brokers, could enforce the clause against the shipowners; and (2.) that a custom by which commission was payable only if hire was earned under the charterparty could not be set up by the shipowners as an answer to the brokers' claim, inasmuch as it was inconsistent with the terms of the clause.

Robertson v. *Wait* (1853) 8 Ex. 299 approved and followed.

Decision of the Court of Appeal [1918] 2 K. B. 498 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Bailhache J.

The respondents, who acted as brokers for the charterers in the charterparty next hereinafter mentioned, claimed commission from the appellants, the shipowners, for effecting a time charterparty dated September 28, 1916, between the appellants, as owners of the steamship *Flore*, and the Lubricating and Fuel Oils Company, Ld., as charterers.

Clause 29 of the charterparty was as follows:—"A commission of three per cent. on the estimated gross amount of hire is due to Leopold Walford (London), Ld., on signing this charter (ship lost or not lost)."

The respondents were not parties to the charterparty, but in answer to an application by the respondents to join the charterers as plaintiffs the appellants agreed to raise no

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD ATKINSON, and LORD WRENBURY.

(1) [1918] 2 K. B. 498.

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point as to parties, and the action was treated as if the charterers had been added as plaintiffs. This charterparty was an extension of a previous charterparty dated December 9, 1915, which contained a clause similar to clause 29 of the later charterparty under which the rate of commission was 5 per cent. payable to H. E. Moss & Co., the owners' brokers; and by arrangement between Messrs. Moss and the respondents the latter shared in the commission, which was in fact paid to or retained by Messrs. Moss out of the monthly payments of hire made by the charterers.

The charterparty of September 28, 1916, was made in pursuance of an agreement of even date therewith made in Paris between the appellants and the charterers, whereby it was agreed that the charterparty of December 9, 1915, should be suspended for about five weeks from the termination of the discharge of the *Flore* then going on at Rouen, while the ship went a trip to Algiers and back, and that the date of expiry of the charterparty should be deferred for a corresponding period, and that from the date of expiry there should begin a new period of extension; and the agreement provided that the brokers should continue their good services to either party, but that their total brokerage fixed for the original charterparty at 5 per cent. should be reduced for the extension period to 3 per cent.

Before the expiration of the earlier charterparty, namely, in January, 1917, the *Flore* was requisitioned by the French Government, and consequently did not enter upon service under the new charterparty. The appellants refused to pay to the respondents any commission, and by their defence they pleaded a custom of the trade that chartering brokers' commission was payable only in respect of hire duly earned under the charterparty.

Bailhache J. gave judgment for the appellants, the defendants. He said that a custom was proved before him in the case of *Harley & Co.* v. *Nagata* (1), that in time charterparties brokers' commission was payable out of hire that was earned, and was not payable at all unless hire was earned;

(1) (1917) 23 Com. Cas. 121.

and that that custom was irrespective of the form of the commission clause. That custom was proved by very satisfactory evidence in the earlier case, and had been proved again in this case, and it ought to prevail.

The Court of Appeal (Pickford, Bankes, and Scrutton L.JJ.), in reversing this decision, held that the shipowners could not lawfully set up a custom which was inconsistent with the express terms of the charterparty.

May 16, 19, 1919. *R. A. Wright K.C.* and *Alexander Neilson K.C.* for the appellants.

The shipowners rely upon the custom, which the judge has found to prevail in London as regards time charters, that brokerage is payable only out of the hire as earned. The commission clause in the charterparty does not represent the true contract between the shipowners and the brokers. There was here an oral contract as to the amount of commission into which the custom was imported, and the judge so found. The second charterparty is a mere continuation of the first, under which the course of business was to deduct the commission from the hire as received, and it proceeds upon the same footing except as regards the amount of commission. In other words the commission continues to be payable according to the custom. If clause 29 of the charterparty embodies the contract between the shipowners and the brokers it is conceded that it must prevail and that the custom is excluded, and this case then becomes indistinguishable from *Robertson* v. *Wait*. (1)

[They also cited *Harley & Co.* v. *Nagata* (2), *Mollett* v. *Robinson* (3); *West* v. *Houghton* (4); *The Nuova Raffaelina* (5); *In re Empress Engineering Company* (6); *Wake* v. *Harrop* (7).]

MacKinnon K.C. and *Raeburn K.C.* for the respondents.

For fifty years past it has been the custom to insert in charterparties a clause dealing with the broker's commission. That constitutes the charterer a trustee for the broker.

(1) 8 Ex. 299.
(2) [1917] 23 Com. Cas. 121.
(3) (1872) L. R. 7 C. P. 84; reversed (1875) L. R. 7 H. L. 802.)
(4) (1879) 4 C. P. D. 197.
(5) (1871) L. R. 3 A. & E. 483.
(6) (1880) 16 Ch. D. 125, 129.
(7) (1861) 30 L. J. (Ex.) 273, 277.

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Formerly the clause was usually in the form in this case, but an alternative form is used in which the commission is payable on hire as earned: *White* v. *Turnbull, Martin & Co.* (1) There is here an express contract as to payment of commission signed by the shipowner, and the alleged custom affords no answer to that. *Robertson* v. *Wait* (2) has been referred to with approval in many cases, of which the latest is *Lloyd's* v. *Harper.* (3)

R. A. Wright K.C. replied.

LORD BIRKENHEAD L.C. My Lords, the issues under debate seem to me to be so plain that they may conveniently be disposed of at once. This is an appeal from a decision of the Court of Appeal delivered on July 9, 1918, reversing a decision of Bailhache J. delivered on April 10, whereby he directed judgment to be entered for the defendants with costs. It follows from what I have said that the defendants are the appellants before your Lordships' House.

The facts are very simple. The charterers' brokers claim commission from the shipowners under a charterparty dated September 28, 1916, which was a continuation of an earlier charterparty dated December 9, 1915, by which the s.s. *Flore* was demised. The owners were Les Affréteurs Réunis Société Anonyme and the charterers were the Lubricating and Fuel Oils, Ld. The relevant clause in the charterparty is No. 29, and is as follows: "A commission of three per cent. on the estimated gross amount of hire is due to Leopold Walford (London), Ld., on signing this charter (ship lost or not lost)."

Your Lordships are not troubled here with any question of amount.

My Lords, the first charterparty, that of December 9, 1915, would have ended on March 5, 1917, but its duration proved longer than the twelve months originally contemplated owing to an interruption with the details of which your Lordships are not concerned. The second charterparty would, if matters had remained normal, have commenced on March 5, but in

(1) (1897–8) 3 Com. Cas. 13, 183. (2) 8 Ex. 299.
(3) (1880) 16 Ch. D. 290.

the month of January the French Government requisitioned the ship. The first charterparty came to an end and the second never became effective. The second charterparty was entered into after an agreement between the owners and the charterers dated September 28, 1916, which contained the following clause: "The brokers will continue their good services to either party, but their total brokerage fixed for the charterparty at 5 per cent. will be reduced for the extension period to 3 per cent. For all other conditions of detail the brokers of the respective parties will have to fix together the final clauses, it being understood that the question of principle expressed above will be faithfully observed according to the good faith of the parties, and in accordance with the business customs in shipping matters and the spirit of the present agreement." Clause 34 of the second charterparty incorporated clause 26 of this agreement, and indeed the whole of this agreement, and should, I think, for clearness, be read: "This charterparty is in extension of that of December 9, 1915, and will take effect at the day and hour at which the earlier charterparty will terminate. Both charterparties are for their due fulfilment subject to the conditions and stipulations contained in the special agreement signed in Paris on September 28, 1916, by the two parties exactly as if these conditions and stipulations were embodied in the present charterparty itself."

My Lords, under those circumstances, the document must be read, in my judgment, as one whole, containing the clause of the French agreement to which I have directed attention. I do not, therefore, read the agreement in this matter as if your Lordships had to deal with a clause in the charterparty on the one hand, and an independent agreement known as the French agreement on the other. Having regard to the undeniable circumstance that the French agreement is incorporated in the charterparty it is impossible to consider that an independent agreement, in relation to the second charterparty, existed at all. A charterparty is, of course, a contract between owners and charterers, and it is elementary that, so far as the brokers are concerned, it is res

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inter alios acta; but the parties in the present case, by an interlocutory and very sensible arrangement, have agreed that the matter shall be dealt with as if the charterers were co-plaintiffs. The question therefore is, can the charterers succeed in such circumstances as the present in such an action against owners?

My Lords, it was decided nearly seventy years ago in the case of *Robertson* v. *Wait* (1) that charterers can sue under an agreement of this character as trustees for the broker. I am unable to distinguish between the decision in *Robertson* v. *Wait* (1) and the conclusion which, in my view, should be reached in the present case. It was conceded by Mr. Wright that unless there was a special and independent agreement in this case he was unable to distinguish the facts in this case from those which were considered in *Robertson* v. *Wait* (1). In my opinion Mr. Wright has failed to establish the existence of an independent agreement.

My Lords, so far as I am aware, that case has not before engaged the attention of this House, and I think it right to say plainly that I agree with that decision and I agree with the reasoning, shortly as it is expressed, upon which the decision was founded. In this connection I would refer to the well-known case of *In re Empress Engineering Company*. (2) In the judgment of Sir George Jessel M.R., the principle is examined which, in my view, underlies and is the explanation of the decision in *Robertson* v. *Wait* (1). The Master of the Rolls uses this language: "So, again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person. As Lord Justice James suggested to me in the course of the argument, a married woman may nominate somebody to contract on her behalf, but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the cestui que trust can take the benefit of the contract."

It appears to me plain that for convenience, and under long-established practice, the broker in such cases, in effect, nominates the charterer to contract on his behalf,

(1) 8 Ex. 299. (2) 16 Ch. D. 125, 129.

influenced probably by the circumstance that there is always a contract between charterer and owner in which this stipulation, which is to enure to the benefit of the broker, may very conveniently be inserted. In these cases the broker, on ultimate analysis, appoints the charterer to contract on his behalf. I agree therefore with the conclusion arrived at by all the learned judges in *Robertson* v. *Wait* (1), that in such cases charterers can sue as trustees on behalf of the broker.

My Lords, this conclusion makes it necessary to ask what is the answer to the plaintiffs' action. I confess that I feel some astonishment at the conclusion reached by Bailhache J., and with all respect for that learned judge I am unable to follow the mental processes by which he reached it. The learned judge has found as a fact that two customs, or as he prefers to call them, practices, which he thought relevant, and indeed decisive, were proved before him. In his view those customs, either severally or jointly, as found by him, are fatal to the plaintiffs' claim. Being very unwilling to do any injustice to the learned judge I will refer to his own language for the precise elucidation of that which he has found. As to the first custom he says (2): "A custom was proved before me in another case of *Harley & Co.* v. *Nagata* (3) to this effect: that it is the invariable practice in time charter-parties that brokers' commission is payable out of hire that is earned; the charterer sends the hire money to the broker, the broker deducts his commission from the hire, and sends the balance to the shipowner. That is the way in which it is paid; and, further, that it is the invariable practice that, unless hire is earned, no commission is payable at all." I have to observe upon this, which I call the first finding, that I demur to the practice of finding facts upon evidence given in other cases, between other parties; and in the second place that the evidence in support of this alleged custom produced before the learned judge in this particular case was of the slenderest possible character. Nor does the custom gain added strength from the circumstance, apparently relied

(1) 8 Ex. 299. (2) [1918] 2 K.B. 499.
(3) 23 Com. Cas. 121.

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upon, that many charterparties contain an express stipulation that no commission shall be payable unless hire is paid. If such a custom is so clear and so much relied upon in the City of London why, one is tempted to ask, is this stipulation necessary? I am far from deciding—I am not called upon to do so in this case—that such a custom does not exist, and that it may not be proved by proper evidence. If in another case it is proved hereafter that there exists any other than the ostensible contract between owners and brokers proper effect will no doubt be given to it in the Courts.

But, my Lords, a further finding of the learned judge is in my view very surprising. He does not number his findings, but that which I now approach is distinguishable from and goes farther than, that which I have already examined. He found that a custom which he thinks is proved is "entirelly irrespective of the form in which the commission clause finds its way into the charterparty," and "that the form of the commission clause has no effect at all upon the contract between the broker and the shipowner for the payment of hire." It is necessary to inquire somewhat closely what this finding really means. We have seen that, as the result of an authority binding upon the learned judge, charterers can sue upon a commission clause, under the circumstances which I have attempted to explain, as trustees for the broker. My Lords, whom can they sue? Obviously the shipowners. Why can they sue for the amount of the commission? Obviously because the owners have contracted to pay it. But the learned judge, quite unmoved, apparently, by those considerations, finds as a fact that a custom has been proved before him that a party shall not pay that which, presumably with the full knowledge of the custom, he has explicitly contracted to pay. In contrast with the extreme sanctity which the learned judge concedes to this custom (I am speaking now of what I call his second finding) I confess that I am somewhat attracted by the tone of his reference to the deliberate contract entered into between the parties. The custom, the learned judge says, is "irrespective of the form in which the commission clause finds its

way into the charterparty." My Lords, in my experience important clauses do not "find their way" into important contracts. They are, on the contrary, the fruit of negotiation and consideration. The process is by no means so fortuitous as is supposed. The learned judge, in my judgment (and here I think the comments of the learned Lords Justices in the Court of Appeal are perfectly well-founded and in no way exaggerated), has in effect declared that a custom may be given effect to in commercial matters which is entirely inconsistent with the plain words of an agreement into which commercial men, certainly acquainted with so well known a custom, have nevertheless thought proper to enter. Much evidence would be necessary to convince me of the existence of such a custom, and, if it were forthcoming, I should nevertheless hold the custom to be bad on grounds which seem to me to be both notorious and elementary.

My Lords, I have only one further observation to make. The learned judge finds in the passage I have already quoted that "the form of the commission clause has no effect at all upon the contract between the broker and the shipowner for the payment of hire." This observation might or might not possess relevance or value in a case in which there was a scintilla of evidence of the existence of a contract between the broker and the shipowner for the payment of hire. Nothing I say to-day prejudges such a case if and when it arises; but in this case my conclusion is that there was no such contract and there was no evidence whatever of such a contract. It became necessary to reach a conclusion both in relation to the first charterparty and in relation to the second charterparty. Mr. Wright referred your Lordships to certain evidence orally given upon which he attempted to found his contention that there was here such an independent agreement between broker and shipowner as was necessary to relieve him from the doctrine in the leading case to which your Lordships have been referred.

In my judgment the evidence upon which Mr. Wright relies is insufficient to support the burden which he attempted to place upon it. I find no evidence in the

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discussion which took place between the parties of any concluded agreement, or of any intention even to arrive at any agreement, except the provisional understanding as to the figure which should ultimately be inserted in the charterparty. For this reason I dismiss the charterparty in this connection by saying that there is no evidence which was brought before the learned judge which reasonably entitled him to arrive at the conclusion that in relation to that charterparty there was any independent agreement.

Attempting the same inquiry in relation to the second charterparty I come face to face at once with the French agreement, and I have already pointed out to your Lordships that clause 34 in the second charterparty, by incorporating the French agreement, shows that it was the intention of the parties not to treat that agreement as a substantive and independent contract, but as an instrument auxiliary and contributory to the real contract which was the second charterparty. I therefore reach the conclusion that there was no independent contract either in connection with the first charterparty or, approaching the case which is immediately relevant, with the second charterparty.

Holding this view I am bound to say with great respect that I am unable to follow the conclusions the learned Judge has reached in this case; and upon a matter which seems to me very clear, I am of opinion that this appeal must be dismissed with costs, and I move your Lordships accordingly.

VISCOUNT FINLAY. My Lords, this action is brought to recover commission said to be due under the 29th clause of the charterparty of September 28, 1916. The clause in question is this: "A commission of three per cent. on the estimated gross amount of hire is due to Leopold Walford (London), Ld., on signing this charter (ship lost or not lost)."

The case was tried before Bailhache J., and he found that there was a custom, which in his opinion was not excluded by the charter, to the effect that commission to the broker should be paid upon the hire as received from time to time. One would be very slow, of course, to differ from a conclusion on

a point of fact such as the existence of a custom, particularly when it is a decision of Bailhache J. Mr. Neilson argued that there was evidence of an agreement, independent of anything in the charterparty itself, to which a custom might apply, supplied by the fact that this charterparty was in continuation of an earlier charterparty, and that the terms of dealing as between the broker and the shipowner must be taken to be the same except as far as they were varied, namely, with regard to the amount of the commission. I do not think it is necessary to examine that question, because whether there was such an independent agreement or not, the question really is whether such an agreement as that and such a custom as that, which would be incorporated with the agreement, can be reconciled with clause 29 of the charterparty, and, if it is not reconcilable, whether such a custom as that can be raised in face of the terms of the charter. That depends, of course, entirely upon the question whether clause 29 is in the nature of a contract between the brokers and the shipowners. If the contract in clause 29 was purely as between the shipowners and the charterers, it would not interfere with the terms of any independent contract under the terms of the custom, supposing that such an independent contract had been entered into between the plaintiffs and the shipowners. But it appears to me that it is elementary law that if clause 29 is to be taken to be a clause entered into by or on behalf of the brokers, they cannot set up a custom such as that contended for; the two are absolutely inconsistent.

Now in order to avoid the effect of that argument, Mr. Wright contended that the broker was not really a party to clause 29 at all. The difficulty in the way of that argument to my mind is this, that clause 29 in part, at all events, must have been, I think, entered into by those who were parties to the charterparty on behalf of the broker, because the amount of brokerage is specified in clause 29, and to that extent it seems to me that we must regard the charterer as having entered into that bargain in the interests of the broker and as a trustee for the broker.

Well, my Lords, it seems to me to be impossible to dissect

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the clause. If the overwhelming presumption is that in part it was entered into on behalf of the broker, it appears to me to be extremely difficult to say that it was not entered into on behalf of the broker altogether, and, if so, then the words at the conclusion of clause 29 "on signing this charter (ship lost or not lost)" are words governing the conditions on which the commission is to be paid, and which are binding upon the broker. If that is so, it is obvious that, having had the contract reduced into writing on his behalf, it is not open to the broker to set up a custom which is inconsistent with the terms of the clause which through his trustee in this matter he has entered into.

On these grounds I concur in the proposal which has been made by my noble and learned friend on the Woolsack.

LORD ATKINSON. My Lords, I have very little to add. I concur in what has been said by my noble and learned friend on the Woolsack, and also by my noble and learned friend who has preceded me.

I must admit that this appears to me to be an extremely plain case. Two agents employed by their respective principals draw up a written agreement and forward it to the respective principals to be signed by them. In this agreement I find a stipulation regarding the remuneration which is to be paid to those respective agents. I should have thought that when a charterer enters into a charterparty stipulating for payment of commission, it must be assumed, as that is the remuneration of the agent, that he does so with the full consent and concurrence of the agent. He makes that contract with regard to the agent's remuneration for and on behalf of the agent.

Now that being so, the principal in this case, the charterer, is added as a co-plaintiff, and what is the course of the proceeding? The two plaintiffs come into Court and they put down the written agreement, the charterparty. It contains a clause providing that commission is to be paid to the broker in certain events. He stands upon their written document. What is the answer? The answer is, "Oh, that is not the agreement at all—our agreement is a wholly independent

thing—it was made by parole ; it was made in reference to, and practically embodied a certain custom." Well, my Lords, I concur with every one of the Lords Justices, that there is not a shadow of evidence of that collateral and independent agreement ; and, if there were, there is this misfortune about it, that being directly in conflict with the written agreement it cannot be taken advantage of to vary the written agreement. I therefore think there is no answer to the suit instituted upon the written agreement ; there is nothing to show that there was any collateral independent agreement ; and the independent agreement relied upon, even if proved, could not be acted upon inasmuch as it is, as I have already said, directly in conflict with the letter of the written document into which the parties have entered. I cannot conceive that there should be in any line of business a custom which would provide that no matter what written agreement was to be entered into, the custom is not to be excluded, but is to prevail over the terms of the written document.

LORD WRENBURY. My Lords, I find myself in entire agreement with all that has been said by your Lordships who have preceded me.

We have here to do with a contract between two parties reserving a benefit to a third. The two parties are the shipowners and the charterers, the third party is the broker of one of them, who is to be remunerated in respect of a contract which is being made for the hire of a ship. The particular form of contract in question is of course prepared by, or is under the eyes of the broker who is negotiating the matter. It is sent to the principals for signature, and they sign it, and there is contained in it a clause which reserves a benefit to the broker. Under those circumstances an action is brought by the broker against the shipowner for the commission which is expressed to be payable to him under the contract between the shipowner and the charterer—a contract to which he himself, I agree, was not a party. By agreement between the parties the record is to be treated as if the charterer were joined as a plaintiff in the action.

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Lord Wrenbury.

The case is one in which an action can be brought on behalf of a person to whom a benefit is reserved, although he is not a party to it. That is the subject of the decision in *Robertson* v. *Wait*. (1) Under those circumstances the shipowners, the defendants in the action, defend the action and in effect are here saying: "It is perfectly true that we attached our signature to this document; it is perfectly true that it contains in Article 29 this stipulation in favour of a third party; but that means nothing at all—that is not the bargain at all to which we were parties. The matter is governed by a certain custom."

My Lords, I feel myself in great difficulty in understanding a contention of that sort. It is said that in this particular business there exists a custom (and I will take it for the moment that the custom is proved) that in time charterparties broker's commission is payable out of hire earned and is not payable unless hire is earned. In this contract, however, there is a stipulation that the commission shall be on the estimated gross amount of hire on signing the charter ship lost or not lost. I find myself quite unable to understand how it can be set up that into a contract expressed in those terms there can be introduced a custom to an exactly contrary effect. Directly it is conceded that the broker, although not a party to the contract, can sue on the contract, inasmuch as he can sue by the charterer as trustee for him, it appears to me that the case really is over. I have only to read Article 29 and I find there an express stipulation—a stipulation which is accepted by the signature of the defendants, that this payment shall be made, and for that payment it appears to me that the defendants are liable.

My Lords, I agree that the appeal fails and should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 19, 1919.

Solicitors for the appellants: *Thomas Cooper & Co.*

Solicitors for the respondents: *Lawrence Jones & Co.*

(1) 8 Ex. 299.

[HOUSE OF LORDS.]

H. L. (E.)*

1919

June 3.

BOURNE AND ANOTHER . . . . APPELLANTS;

AND

KEANE AND OTHERS . . . . RESPONDENTS.

Superstitious Uses—Bequest for Masses for Soul of Testator—Bequest to Monastic Order—Statute of Chantries (1 *Edw.* 6, *c.* 14)—*Roman Catholic Relief Act*, 1829 (10 *Geo.* 4, *c.* 7), *ss.* 28, 29—*Roman Catholic Charities Act*, 1832 (2 *& 3 Will.* 4, *c.* 115), *s.* 1—*Roman Catholic Charities Act*, 1860 (23 *& 24 Vict. c.* 134), *s.* 1.

A bequest of personal estate for masses for the dead is not void as a gift to superstitious uses.

West v. *Shuttleworth* (1835) 2 My. & K. 684, and the cases founded upon it (*Heath* v. *Chapman* (1854) 2 Drew. 417; *In re Blundell's Trusts* (1861) 30 Beav. 360; *In re Fleetwood* (1880) 15 Ch. D. 594; and *In re Elliott* (1891) 39 W. R. 297), overruled on this point.

So *held* by Lord Birkenhead L.C., Lord Buckmaster, Lord Atkinson, and Lord Parmoor; Lord Wrenbury dissenting.

Held by Lord Wrenbury that *West* v. *Shuttleworth* had been recognized as an authority for so long a period that it ought not now to be disturbed.

The authorities upon the non-disturbance of decisions of long standing reviewed.

An Irish Roman Catholic testator, domiciled in England, bequeathed 200*l.* to Westminster Cathedral for masses, and 200*l.* and his residuary personal estate to "the Jesuit Fathers, Farm Street," for masses.

Eve J. and the Court of Appeal held, on the authority of *West* v. *Shuttleworth*, that the gifts were void as gifts to superstitious uses. At the Bar of the House the next of kin contended that the bequests to the Jesuit Fathers were void under the Roman Catholic Relief Act, 1829, as gifts to a monastic order.

Held (1.) (Lord Wrenbury dissenting) that the bequests were not void as superstitious; (2.) (Lord Wrenbury expressing no opinion on this point) that the contention of the next of kin as to the bequests to the Jesuit Fathers failed—by Lord Birkenhead L.C., and Lord Atkinson, for insufficiency of evidence as to the constitution of the community, and by Lord Birkenhead L.C., on the further ground that the point was not raised by the next of kin in their case; by Lord Buckmaster and Lord Parmoor (following *In re Smith* [1914] 1 Ch. 937) because these bequests were given, not to a monastic order, but to individual members of a particular order resident at a named place, and were impressed with no trust for the benefit of the order.

Held, therefore, that all the bequests were valid.

Decision of the Court of Appeal [1918] 2 Ch. 350 reversed.

* *Present:* LORD BIRKENHEAD L.C., LORD BUCKMASTER, LORD ATKINSON, LORD PARMOOR, and LORD WRENBURY.

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BOURNE v. KEANE.

APPEAL from a decision of the Court of Appeal (1) affirming a decision of Eve J.

Edward Egan, by his will dated November 29, 1916, appointed the respondents James Keane and Thomas Cowperthwaite executors thereof, and bequeathed (inter alia) the following sums for masses: To the Cathedral, 200*l.*; to the Jesuit Fathers, Farm Street, 200*l.*; and to the Dominican Fathers, Black Abbey, Kilkenny, 100*l.*; and, after providing for funeral expenses, he gave what money should remain after all expenses to the Jesuit Fathers, Farm Street, for masses.

The testator was an Irish Roman Catholic. He died on December 27, 1916, and was at the date of his death domiciled in England.

The executors took out an originating summons to determine (inter alia) the questions: whether the Westminster Cathedral was the cathedral referred to in the will, whether the gift to such cathedral for masses was valid, whether the pecuniary bequests to the Jesuit Fathers and to the Dominican Fathers were valid, and whether the gift of residue to the Jesuit Fathers was valid.

The court appointed the appellant, the Rev. Terence Donnelly, to represent the Jesuit Fathers, the respondent, the Rev. James Alphonso O'Reilly, to represent the Dominican Fathers, and the respondent, Catherine Broderick, to represent the statutory next of kin of the testator.

Eve J., having previously decided that the Westminster Cathedral was the cathedral referred to by the testator, held, on the authority of *West* v. *Shuttleworth* (2), that all these gifts were void, and his decision was affirmed by the Court of Appeal (Swinfen Eady M.R., Warrington and Duke L.JJ.).

Two questions arose for determination on the present appeal:

1. Whether the bequests in question were void as gifts to superstitious uses.

2. If not, whether the bequests to the Jesuit Fathers and to the Dominican Fathers were void as gifts to religious orders of the Church of Rome bound by monastic vows.

(1) [1918] 2 Ch. 350. (2) 2 My. & K. 684.

The second question was not argued by the respondent, Catherine Broderick, in the Court of Appeal and was not raised by her in her case on the appeal to this House.

The evidence as to the constitution of the Jesuit Fathers and of the Dominican Fathers is fully set out in the judgment of the Lord Chancellor.

The respondent, the Rev. J. A. O'Reilly, did not appear. The respondents, the executors of the will, took no part in the argument.

March 21, 24, 25, 27; May 14.

Hon. Frank Russell K.C. and *C. J. Mathew K.C.* (with them *F. McMullan*) for the appellants.

There are here two questions to be determined: 1. Are gifts for masses for the testator's soul illegal? 2. If not illegal, are they good charitable gifts? As to the first question, it is conceded that it was not open in the Court of first instance or in the Court of Appeal; but it has never been raised in this House. At the date of the passing of the Chantries Act (1 Edw. 6, c. 14) these gifts were perfectly good: Co. Litt. pp. 93b, 95a and b, 96b, §§ 133, 135, 137, where tenure by frankalmoigne and tenure by Divine service are described. It is there said that they which hold in frankalmoigne are bound of right before God to make orisons, prayers, masses, and other Divine services for the souls of their grantors, and the difference between tenure in frankalmoigne and tenure by Divine service is explained to be that in the latter case the manner of the service is specified, e.g., to sing a mass every Friday. By 31 Edw. 3, c. 11, it was enacted that in case of intestacy the ordinary should depute the next and most lawful friends of the deceased to administer his goods; "which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the King's Court, for to administer and dispend for the soul of the dead." The first statutory restriction on the gifts is to be found in 23 Hen. 8, c. 10, which imposed a time limit of twenty years upon assurances of land for the performance of obits. That was a Mortmain Act, and it shows that within

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that limit devises of land for the purpose of obtaining masses were perfectly good. The will of Henry VIII, which is set out in Froude's History of England, vol. IV., pp. 523-528; 3rd ed., pp. 525-530, contained a direction for setting up an altar at Windsor, "honorably prepared and apparelled for daily masses there to be said perpetually while the world shall endure." The first Prayer Book of Edward VI., issued in 1549 (2 & 3 Edw. 6, c. 1) (which was after the date of the Chantries Act), included prayers for the dead in the Prayer of Consecration in the Communion Service. But in the second Prayer Book, which was introduced by 5 & 6 Edw. 6, c. 1, in 1551, prayers for the dead drop out. At the date of the Chantries Act there was nothing in either the common law or the statute law of the land to prohibit gifts of personal estate for masses for the dead. Then the question is: What was the effect upon the gifts of the Statute of Chantries?

The preamble of that Act is framed in language which, if not vituperative, is not pleasant to Roman Catholic ears, and it is that preamble which has caused most of the trouble in this matter. It recites that "a great part of superstition and errors in Christian religion hath been brought into the minds and estimations of men, by reason of the ignorance of their very true and perfect salvation through the death of Jesus Christ, and by devising and phantasing vain opinions of purgatory and masses satisfactory to be done for them which be departed, the which doctrine and vain opinion by nothing more is maintained and upholden than by the abuse of trentals" (an office for the dead continuing thirty days), "chantries, and other provisions made for the continuance of the said blindness and ignorance," and that the amendment thereof and converting the same to good and godly uses, as in erecting of grammar schools, augmenting of the universities, and better provision for the poor and needy, could not in that Parliament be conveniently done, nor ought to be committed to any other than the King, who would wisely and beneficially both for the honour of God and the weal of the realm order and dispose of the same. The Act then proceeds to give to the King, first, all manner of colleges, free chapels, and chantries in esse

within five years before the first day of the then existing Parliament and the lands, etc., belonging thereto; secondly, all lands and rents assigned or paid for the finding or maintenance of a priest to have continuance for ever, and whereby any priest had been maintained or found within the said period of five years: s. 2; thirdly, all lands or rents theretofore assigned for the finding or maintenance of a priest for a term of years, and employed for that purpose within the said period of five years (saving the rights of the reversioners): ss. 3 and 4; fourthly, all lands or rents theretofore given to be wholly employed towards the finding or maintenance "of any anniversary or obit or other like thing, intent or purpose, or of any light or lamp in any church or chapel, to have continuance for ever," which had been kept or maintained within the said period of five years: s. 5. Finally, the Act gives to the King all moneys theretofore given or assigned, to have continuance for ever, and which had been paid within the said period of five years, by any manner of corporations, guilds, fraternities, etc., towards the finding or maintenance of a priest, of any anniversary or obit, lamp, light or lights or other like thing: s. 7. That is the only section in the Act which deals with personal estate. The Act also excepts from its operation the Universities of Oxford and Cambridge, St. George's Chapel, Windsor, the Colleges of Eton and Winchester, and the cathedrals of episcopal sees: s. 19. It is incredible that if the intention of the Act was to render all these gifts illegal there should have been any exception at all. Sect. 38 is important. It deals with the maintenance of priests and the founding of obits in the future, and it provides that it shall not be lawful to re-enter lands for the breach of a condition as to finding a priest, obit, etc. That shows that the Legislature did not regard obits as illegal, but discouraged them to this extent, that if land was given upon condition to found an obit the holder of the land might disregard the condition with impunity. The essential features of this Act are as follows: 1. It only applies to then existing dispositions which had been operative within the previous five years. 2. With a small exception, it applies to land only. 3. That exception is that

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it applies to then existing gifts of money in perpetuity, operative within the period of five years, by corporations, etc. 4. It does not anywhere avoid the gifts with which it deals, but simply gives the property to the King. 5. It excepts from its operation the colleges of the Universities of Oxford and Cambridge, and chantries founded at various places. 6. It contemplates the founding of obits and suchlike things in future, and does not avoid them; it merely says that where land is given subject to such conditions a person entitled to re-enter on breach of the conditions shall not re-enter. The most that can be said of this Act is that it desired to discourage these gifts. It does not make them illegal. As to existing gifts it transfers the property to the King, as to future gifts it recognizes them. The preamble, by using harsh words, cannot make the gifts illegal, if the enacting part of the statute does not do so. Undoubtedly for a great number of years gifts for masses were illegal, but on a totally different ground. In 1581, by 23 Eliz. c. 1, the hearing or the saying of mass was made an offence punishable by fine and imprisonment, and that statute remained in full force until it was mitigated by the Roman Catholic Relief Act, 1791. It is said that *Adams and Lambert's Case* (1), which was decided after this Act of Elizabeth, shows that these gifts were illegal under the Chantries Act. That case decided four things: (1.) that land given for superstitious uses to a son or daughter or other relative is nevertheless within the Act; (2.) that land given in tail or for life is within the Act, as well as estates in fee or for years; (3.) that a devise of land, not to the intent to find a priest, but upon condition to find him, is within the Act; (4.) that all the lands in question in that case were given by the Act to the King. Lord Ellesmere says of Coke's report of this case: "Whoso doth read *Adams and Lambert's Case* (2) shall run into a wood or thicket out of which he shall not easily wind himself: he" (Coke) "hath so darkened the case by many intricate

(1) (1602) 4 Rep. 104*b*.

(2) The Lord Chancellor Egerton's observations on the Lord Coke's Reports . . . . Lond. *n.d.* [c. 1710, authorship doubted, see D. N. B. xvii. 163], p. 21.

differences whereof the Court that argued the same did never dream." And indeed it is difficult to distinguish the dicta of the judges from the comments of the reporter. The date of the will in that case is not given in the main report, but it appears from the record as extracted by Coke (1) that the will was temp. Hen. 6, 1431. In the course of the judgments in the case under discussion numerous cases were cited, which were supposed to be decisions within the Act. In many of them no date is given, but in every case (with one doubtful exception) where the date of the instrument is given it is before the Act. The only case which causes any difficulty is the *Dean of St. Paul's Case* (2), where it is stated that "the executors of A. B. according to the will of their testator, anno 6 Eliz. 2, assigned and conveyed" lands to the value of 14*l.* per annum to the Dean and Chapter of St. Paul's to find a competent sustentation yearly of 10 marks sterling for a priest and his clerk to sing mass every day for the testator's soul and all Christian souls in the Church of St. Paul; and all the other profits of the premises by the executors were assigned to be employed for the yearly obit for the said testator in the said church. That might possibly mean that the will, which was the operative instrument, was made before the Act of Chantries, although the executors did not execute the conveyance they were directed to make by the will until subsequently. But, if not, there is conceivably some mistake in the date. The "2" is unintelligible. Not only is it extremely improbable that in the sixth year of the reign of Elizabeth a gift should be made for the purpose of singing masses in St. Paul's, but in the report in Dyer it is stated: "Which chantry priest was found for 6*l.* 13*s.* 4*d.* per annum until the Statute of Chantries [1 Edw. 6, c. 14], but the obit was not kept within five years of the said statute." This clearly shows that the gift must have been before the Act. The question was whether the land was given to the Queen or only the annual rent, and it was decided that she had no title to more than the annual rent of 6*l.* 13*s.* 4*d.*

It has never been said that *Adams and Lambert's Case* (3)

(1) 4 Rep. 96*a*. (2) (1580) 4 Rep. 109*a*; 3 Dyer, 368*a*.
(3) 4 Rep. 104*b*.

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was a decision with regard to lands given after the Act, but it is attempted to spell out of the general observations which occur throughout the case (1) as to the policy and intent of the Act an intention on the part of the Court to treat as illegal all gifts of the kind mentioned in the Act, whether made before or after the Act. In the appellants' submission that case amounts to nothing more than a decision upon a devise which was clearly within the terms of the Act. Duke on Charitable Uses, 1st ed., p. 106; Bridgman's ed., p. 350, is also relied on in support of the proposition that the Chantries Act renders illegal all gifts for superstitious uses within the meaning of the Act, whether before or after the Act, but the cases cited by the learned author do not establish that proposition. A large number of cases under the Act are collected at p. 466 of Bridgman's edition, and again the same difficulty arises that in many of the cases the date of the gift is not given; but wherever it is given it is before the Act. The Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32), mitigated to some extent the provisions of the Act of Elizabeth. It provided that no person who should subscribe the oath thereby appointed to be taken should be prosecuted for professing the Popish religion or for hearing or saying mass; but by s. 17, all uses, trusts or dispositions which immediately before the passing of the Act were deemed superstitious were to continue to be so deemed, anything in the Act contained notwithstanding. The next Act is of great importance. Toleration had been granted to Dissenters, and by the Roman Catholic Charities Act, 1832 (2 & 3 Will. 4, c. 115), Roman Catholics are put on the same footing as Dissenters in respect to their schools, places for religious worship, education and charitable purposes in Great Britain, and the property held therewith and the persons employed in or about the same. It is incredible that the Legislature should at the same time have legalised the Roman Catholic places of worship and retained any illegality attaching to the ceremonies in their places of worship. The implication is at least as strong that this statute abolished any illegality which may have been implied from the language of the

(1) 4 Rep. 106*b*, 109*b*, 111*b*, 113*a*.

Statute of Chantries as the implication that the Statute of Chantries created a hitherto non-existent illegality. So far as Catholics are concerned, the mass is the central supreme rite of their religion, without which their religion would be a mere husk, and prayers for the dead are an essential part of every mass. If then a gift to build a Roman Catholic Cathedral is valid, how can it be said that a gift for masses is illegal? The nature of the mass is fully explained by Dr. Delaney in his evidence in *Attorney-General* v. *Delaney*. (1) In the appellant's submission the modern authorities on this question are wrong and ought to be overruled. They all depend on the decision of Lord Cottenham, when Master of the Rolls, in *West* v. *Shuttleworth* (2) in 1835, where bequests for masses for the soul of the testatrix were held void under the Chantries Act. Lord Cottenham rightly points out that the legacies in question were not within the terms of the statute of Edw. 6, which, as had been observed by Sir William Grant in *Cary* v. *Abbot* (3), applied only to existing uses, but he then says that "that statute has been considered as establishing the illegality of certain gifts, and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in Duke, been decided to be within the superstitious uses intended to be suppressed by that statute." Apparently the Master of the Rolls means "considered as shown in the cases in Duke," which do not show anything of the kind. It is probable that the attention of the Master of the Rolls was not called very closely to the terms of the Act, and no mention is made of s. 38, which contemplates future gifts of this kind. *Attorney-General* v. *Fishmonger's Co.* (*Kneseworth's Will*) (4), which is also a decision of Lord Cottenham, is not in point, because it was a decision upon a will made in 1513 by a testator who died in 1539, so that it was clearly within the terms of the Statute of Chantries. *Heath* v. *Chapman* (5) is founded on *West* v. *Shuttleworth* (2), but Kindersley, V.-C. takes rather a different view of the statute. He says that at the time of the passing

(1) (1875) I. R. 10 C. L. 104.
(2) 2 My. & K. 684, 697.
(3) (1802) 7 Ves. 490.
(4) (1841) 5 My. & Cr. 11.
(5) 2 Drew. 417.

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of the statute of Edw. 6 gifts for masses were void at common law, and that the statute did not declare the uses void, but assumed that they were void, and gave the property to the Crown. That is a wholly erroneous impression. In *In re Michel's Trust* (1), where an annual sum was bequeathed by a Jew for the saying of a Hebrew prayer on the anniversary of his death, Lord Romilly expressed grave doubts as to the correctness of *West* v. *Shuttleworth* (2) and *Heath* v. *Chapman* (3), but in *In re Blundell's Trusts* (4), which was a case of a gift for masses, he felt bound to follow *West* v. *Shuttleworth* (2) to the full extent, as he could not overrule it. In *In re Fleetwood* (5) and *In re Elliott* (6) the question was treated as concluded by authority. All those cases are founded on *West* v. *Shuttleworth* (2), and are based on one of two erroneous views, (1) that the Chantries Act by implication made all gifts for masses illegal; (2.) that such gifts were illegal at the date of the statute, which gave the property to the King. In *Bowman* v. *Secular Society* (7), where a gift for promoting the subversion of Christianity was upheld, Lord Parker said that a gift for masses for the testator's soul was illegal; but the point was not there raised, and he was putting that forward by way of illustration only. In the same case Lord Buckmaster said that the Roman Catholic religion was never contrary to the common law, and that, when once the statutory prohibitions were taken away, the receipt of money for the general purpose of their faith was not forbidden. An argument has been founded on the Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134). Sect. 1 provides that no gift upon any lawful charitable trust for the exclusive benefit of persons professing the Roman Catholic faith shall be invalidated by reason only that the same estate has been subjected to any trust "deemed to be superstitious, or otherwise prohibited by the laws affecting persons professing the same religion," but that the property may be apportioned and the whole applied to lawful purposes. It is said that

(1) (1860) 28 Beav. 39.
(2) 2 My. & K. 684, 697.
(3) 2 Drew. 417.
(4) (1861) 30 Beav. 360.
(5) 15 Ch. D. 594, 609.
(6) 39 W. R. 297; [1891] W. N. 9.
(7) [1917] A. C. 406, 437, 474.

there are no superstitious trusts to which the statute can refer except those declared to be superstitious by *West* v. *Shuttleworth*. (1) That is not admitted. But, however that may be, all that the statute says is that if there is a bad use mixed with a good use the bad use does not kill the good use, but is applied cy-près. If *West* v. *Shuttleworth* (1) cannot stand on its own authority, but requires this Act to support it, then the Act is turned from being a relieving statute into a penal statute. There is no adoption of *West* v. *Shuttleworth* (1) by the statute, but the question is left as it was before. If it were otherwise, the decisions in which *West* v. *Shuttleworth* (1) was discussed after the Act would have proceeded on the force of the Act. There is nothing either in the frame or in the object or in the phraseology of the statute to make that bad which would otherwise be good. In other countries, where the Chantries Act does not apply, gifts for masses have been held good; in Canada in *Elmsley* v. *Madden* (2); in New Zealand in *Carrigan* v. *Redwood* (3); in Australia in *Nelan* v. *Downes* (4); in the United States in *Holland* v. *Alcock* (5) and in *In re Schouler*. (6) To sum up, these gifts for masses were never illegal before the Chantries Act; they were not rendered illegal by the Chantries Act; if they were, they were rendered illegal by implication only; and that implication has been removed by an equally strong implication under the Roman Catholic Charities Act of 1832. They are therefore good legal gifts at the present date unless they are void for perpetuity.

As to the second question, whether these gifts are charitable, these are gifts of capital out and out and no question of perpetuities arises. But the position is this. The point has never arisen in England because hitherto these gifts have been treated as illegal, and there cannot be a charitable gift for an illegal purpose. But in Ireland, to which the Statute of Chantries does not apply, it has been dealt with in several cases. In *Attorney-General* v. *Delaney* (7) it was held that a gift for masses was not a gift for charitable purposes on the ground that,

(1) 2 My. & K. 684.
(2) (1871) 18 Grant, 386.
(3) (1910) 30 N. Z. L. R. 244.
(4) (1917) 23 C. L. R. 546.
(5) (1888) 108 N. Y. 312.
(6) (1883) 134 Mass. 426.
(7) I. R. 10 C. L. 104.

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masses not being necessarily said in public, there was no element of public benefit about them. In *Attorney-General* v. *Hall* (1) a gift for masses to be said in public was held to be charitable, notwithstanding that the primary motive of the testator was a private benefit to himself. Finally, in *O'Hanlon* v. *Logue* (2) it was held that a gift for masses, whether to be said in public or private, was a good charitable gift on the grounds (1.) that it was a pious gift to God; (2.) that it is a gift from which benefits flow to the whole body of Catholics; (3.) that it is a gift for the support of the ministers of a religion tolerated by law.

Muldoon K.C. (of the Irish Bar) and *J. A. R. Cairns* for the respondent, Catherine Broderick.

1. All these bequests are unlawful under the Chantries Act. 2. The law has been settled for so long that it ought not now to be interfered with. 3. The bequests to the Jesuit Fathers are bequests to an unlawful body bound by monastic vows, and are void as contrary to the policy of the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), ss. 28, 29.

[*Mathew K.C.* This point was not raised by the respondent in the Court of Appeal and it is not raised by the respondent's case.]

As to 1: It is conceded that gifts for masses were not void by the common law of England, which is the same as the common law of Ireland. And in Ireland bequests for masses are lawful: *Read* v. *Hodgens*. (3) The respondent's case is founded entirely upon the Chantries Act. There has been a consensus of opinion in England extending over nearly a century that gifts for masses are void and superstitious. All the text-books have been in similar agreement. Tudor (pp. 5, 140), in discussing superstitious uses, traces the origin of their invalidity to the Act of Hen. 8 and the Chantries Act, and shows that a gift failing on that ground goes to the heir at law or next of kin. The preamble of the Chantries Act, though it has no legislative force, has great importance as indicating the policy of the Act (*Overseers*

(1) [1897] 2 I. R. 426. (2) [1906] 1 I. R. 247.
(3) (1844) 7 Ir. Eq. Rep. 17.

of West Ham v. *Iles* (1)), and shows that the policy of that Act was to regard all uses of this description as superstitious and void. After that Act was passed nobody could conceive that a bequest for masses for the dead was not a superstitious use. This was the view of the Court in *Adams and Lambert's Case* (2), where it is said that the intent and meaning of the Act, as appeared by the preamble, was to extirpate out of men's minds these superstitious errors, and to take them utterly away, in what manner and for what time they were given; and again that the intent of the Act was to prohibit all superstitious uses which were public in churches, for the general prejudice which might accrue by them. In *West* v. *Shuttleworth* (3), when Lord Cottenham said that that statute had been considered as establishing the illegality of these gifts, he must have been referring to his own experience at the Bar. The fact that this Act has been left so long on the statute book after Parliament has known the interpretation which has been put upon it is a strong reason for not interfering with that interpretation. Since *West* v. *Shuttleworth* (3) was decided Parliament has considered this question in 1846 (9 & 10 Vict. c. 59), in 1860 (23 & 24 Vict. c. 134), and again in 1888 (Mortmain and Charitable Uses Act, 1888), but in no case did it touch the Chantries Act. The inference is that Parliament must have accepted Lord Cottenham's construction. Further, the superstitious trusts mentioned in s. 1 of the Act of 1860 can only refer to bequests for masses for the dead, that being the only disability affecting Roman Catholics at that time. "Or otherwise prohibited by law" in that section refers to gifts to a religious order, which would not be superstitious. See Tyssen on Charitable Bequests, p. 51. The statute recognizes *West* v. *Shuttleworth* (3) as good law, and gives a partial, but not an entire relief against that disability. The legislation in relief of Roman Catholics nowhere validates masses, and, if they are tolerated in fact, that is not the same thing as allowing gifts for that purpose, which is encouraging masses.

As to 2: Assuming that *West* v. *Shuttleworth* (3) was wrongly

(1) (1883) 8 App. Cas. 386, 388. (2) 4 Rep. 104*b*, 106*b*, 109*b*.
(3) 2 My. & K. 684.

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decided it has governed the actions of testators and lawyers for eighty-five years, and has been repeatedly followed, and therefore it ought not now to be disturbed. Where there has been a uniform interpretation of a statute, which is constantly acted upon, the Courts recognize that it is better to follow the course of the decisions than to reverse them. This is a principle of general application, and is not limited to cases affecting the title to real property: *Morgan* v. *Crawshay* (1); *Tancred, Arrol & Co.* v. *Steel Company of Scotland* (2); *Attorney-General* v. *Fishmongers' Co.* (*Preston's Will*) (3); *Hebbert* v. *Purchas* (4); *Cohen* v. *Bayley-Worthington* (5); *Clyde Navigation Trustees* v. *Laird* (6); *Associated Newspapers* v. *London Corporation* (7); *Ex parte Willey.* (8)

As to 3: The gifts to the Jesuit Fathers are gifts to the order, and are bad. Under the Roman Catholic Relief Act, 1829, monastic orders are prohibited associations, and bequests which tend to perpetuate such communities are illegal as violating the expressed purpose of the statute. The sections forbidding these orders are saved by the Act of 1860 (23 & 24 Vict. c. 134, s. 7). Every gift to the society as a whole or to individual members of the society, if it tends to strengthen the society, is obnoxious to the statute: *Cussen* v. *Hynes* (9); *Burke* v. *Power* (10); *Sims* v. *Quinlan* (11); *Liston* v. *Keegan* (12); *Walsh* v. *Walsh.* (13) In *In re Smith* (14) Joyce J. held that a gift in trust for "the society or institution known as the Franciscan Friars of Clevedon in the County of Somerset" was an immediate gift to the individual friars composing the society at the testator's death, and was valid. That decision is erroneous and ought to be overruled, first, because the learned judge misconstrued the will, and, secondly, because, assuming that this was a gift to individuals, it was given to them as members of the order and was still bad. That decision

(1) (1871) L. R. 5 H. L. 304, 319, 320.
(2) (1890) 15 App. Cas. 125, 141.
(3) (1841) 5 My. & Cr. 16, 18.
(4) (1871) L. R. 3 P. C. 605, 650.
(5) [1908] A. C. 97, 99.
(6) (1883) 8 App. Cas. 658, 673.
(7) [1916] 2 A. C. 429, 451.
(8) (1883) 23 Ch. D. 118, 127.
(9) [1906] 1 I. R. 539.
(10) [1905] 1 I. R. 119.
(11) (1865) 17 Ir. Ch. Rep. 43.
(12) (1882) 9 L. R. Ir. 531.
(13) (1869) Ir. R. 4 Eq. 396.
(14) [1914] 1 Ch. 937.

went a long way beyond anything that had ever been decided before, and, if it is right, the whole course of decision in Ireland is wrong, and no gift to these orders would be invalid. *Cocks* v. *Manners* (1) is not relevant to the question. This is a gift to the Jesuit Fathers as a body and is in direct conflict with the statute.

Hon. Frank Russell K.C. in reply.

It is impossible to give effect to the Roman Catholic Charities Act, 1860, without legalizing the mass and, if so, a gift for that purpose is good. As to the Chantries Act, the preamble may be used to ascertain the meaning of a statute when the enacting part is ambiguous, but it cannot be used either to enlarge or to restrict the enacting part if the language of that part is clear and free from doubt: Maxwell on Statutes (4th ed.) p.p. 62, 66, 72; *Kent County Council* v. *Lord Gerard* (2) per Lord Herschell. As to the gift to the Jesuit Fathers: There is no evidence sufficient to enable the House to decide that this is a gift for the benefit of the order. There is no society of Jesuit Fathers, but the society is the society of Jesus, and comprises (1.) priests, (2.) persons being trained for the priesthood, (3.) lay members. This is not a gift to an order at all, but is a gift to individuals, members of the society at a particular time, not clothed with any trust for the benefit of the order. Even if this were a gift to the order impressed with a trust for masses, it would still be good, because no gift fails for want of trustees. The Roman Catholic Relief Act, 1829, contains no provision that an individual being a Jesuit cannot hold property. The sections as to monastic orders have been an absolutely dead letter ever since the passing of the Act, and the only reported attempt to enforce these provisions ended in failure: *Rex* v. *Kennedy*. (3) In dealing with an Act with such a history this House will not be astute to put into it a disqualification which is not to be found there. *In re Smith* (4) is directly in the appellants' favour and is an a fortiori case. It is not inconsistent with the Irish authorities, with the single exception of *Burke* v. *Power* (5) (which is

(1) (1871) L. R. 12 Eq. 574.
(2) [1897] A. C. 633, 639.
(3) (1902) 86 L. T. 753.
(4) [1914] 1 Ch. 937.
(5) [1905] 1 I. R. 119.

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a doubtful decision), because in each of the other cases the gift was a gift for the benefit of the order as such, whereas a gift for masses is not a gift for the benefit of the order as such. As to the non-disturbance by this House of long-settled authority, the leading case is *Morgan* v. *Crawshay*. (1) If Lord Chelmsford there lays down the true rule the appellants are not within it. He says: "After this long-continued course of dicta and decisions, unless your Lordships entertained the strongest opinion that the first decision on the subject was erroneous, and all the cases that followed were merely echoes of the first, you would be most unwilling to pronounce a condemnation of the judgments which have been given, and of the practice which has uniformly prevailed for so long a period." Here *West* v. *Shuttleworth* (2) was clearly erroneous and the subsequent cases were merely echoes of it. Moreover, there is here no question of unsettling titles. The mere fact that people have abstained from making gifts for masses on the faith of these decisions is no ground for not disturbing them. A decision which removes a disability stands on a different footing from a decision which imposes one, and is not within the theory of the rule of non-disturbance, which is that more mischief would arise from setting aside doubtful cases than from allowing them to stand. *Colls* v. *Home and Colonial Stores* (3) and *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (4), referred to by Earl Loreburn in *National Society for the Prevention of Cruelty to Children* v. *Scottish National Society for the Prevention of Cruelty to Children* (5) are strong authorities in the appellants' favour on this point.

The House took time for consideration.

June 3, 1919. LORD BIRKENHEAD L.C. My Lords, this is a difficult and an extremely important case. Your Lordships cannot in my view escape the duty, anxious as it undoubtedly is, of overruling decisions which have been treated as binding for generations.

(1) L. R. 5 H. L. 304, 319.
(2) 2 My. & K. 684.
(3) [1904] A. C. 179.
(4) [1914] A. C. 25.
(5) [1915] A. C. 207, 212.

The question is whether, by the law of England to-day, bequests of personalty to be applied to masses for the dead can be supported. I have reached the conclusion, and I am bound to state it, that they can. Unwilling as I am to question old decisions, I shall be able, if my view prevails, to reflect that your Lordships will not within a short period of time have pronounced to be valid legacies given for the purpose of denying "some of the fundamental doctrines of the Christian religion" (1) and have held to be invalid a bequest made for the purpose of celebrating the central sacrament in a creed which commands the assent of many millions of our Christian fellow-countrymen. In the second place, and in the event supposed, your Lordships will have the satisfaction of deciding that the law of England corresponds upon this important point with the law of Ireland, of our great Dominions, and of the United States of America. A decision based, as I believe this to be based, upon a sound view of the law may reasonably appeal to these two powerful considerations of policy as against the admitted impolicy of disturbing old conclusions.

The judge of first instance and the Court of Appeal took the view that so far as they were concerned the matter was covered by authority which could only be reviewed and reversed by your Lordships' House.

The facts upon which your Lordships have to pronounce are shortly as follows :—

On November 29, 1916, Edward Egan, of 15, Alderly Street, Pimlico, London, made a will on a printed form which contained (inter alia) the following bequests :—

"To the Cathedral for Masses 200*l.*

"To the Jesuit Fathers, Farm Street, 200*l.* for Masses.

"To the Dominican Fathers, Black Abbey, Kilkenny, 100*l.* for Masses.

"To the Franciscan Fathers, Walking Street, Kilkenny, 100*l.* for Masses.

"What money remains after all expenses I wish to be given to the Jesuit Fathers, Farm Street, for Masses."

(1) Lord Parker of Waddington in *Bowman* v. *Secular Society* [1917] A. C. 406, 445.

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He died on December 29, 1916, and his executors proved the will on January 23, 1917.

The originating summons was issued on May 24, 1917, but the only questions in issue in this appeal are the latter parts of No. 3 and Nos. 4, 5 and 7.

The only evidence as to the legatees is contained in paras. 13 and 14 of James Keane's affidavit. Para. 13 is mainly concerned with the identification of the expression "the Cathedral," but no question now arises upon that. Para. 14 says: "The Dominican Fathers are a religious body or association comprising in Ireland several hundred members. The Community of them at Black Abbey comprises 12 members or thereabouts of whom the Rev. James Alphonsus O'Reilly is prior. The Jesuit Fathers are a religious body or association comprising several hundred members in Great Britain and Ireland. The Community of them at Farm Street comprises some 30 members of whom . . . . the Rev. Terence Donnelly is the Superior."

For some reason the similar gift to the Franciscan Fathers was not questioned, and no evidence as to their identity was adduced. It is not stated, but I assume, that the Dominican, Jesuit and Franciscan Fathers are communities of Roman Catholic priests, with or without laymen, professing the Roman Catholic doctrines.

It is not necessary to consider in minute detail the sacrament commonly called the mass. Evidence, both informing and complete, as to its exact nature was given in the Irish case *Attorney-General* v. *Delaney* (1), and there was produced to the House in the course of this debate the Ordinary of the Holy Mass, consisting of a print of the service with an English translation.

At the date of the death of Henry VIII. no uniform rite was followed by all persons in communion with Rome; and the ceremonies of ritual varied in the different parishes, dioceses and countries of Christendom. They all had the common characteristic that in one form or another there was a ritual oblation, and the sacrament of the mass was,

(1) I. R. 10 C. L. 104.

and is, a sacrifice propitiatory of the whole Church, both living and dead. The celebration of mass, according to Roman Catholic doctrine, is by no means a benefit entirely confined to the soul or souls of the persons for whom it is directly designed; it benefits (such is the conception) the whole of the living community as well as the dead.

The common law recognized the vaildity of gifts to establish masses. It would, indeed, have been strange if it had discouraged gifts in reinforcement of a religion recommended by its own doctrines. Two common law forms of tenure were recognised under which the duty of the landholder was to say masses. Co. Litt. s. 135 states that tenants in frankalmoigne "are bound of right before God to make orisons, prayers, masses, and other divine services, for the souls of their grantor or feoffor, and for the souls of their heires" (*quære* ancestors) "which are dead, and for the prosperity and good life and good health of their heires which are alive. . . . ." Coke's comment is that notwithstanding the changes in the liturgy, "the tenure in frankalmoigne remaineth; and such prayers and divine service shall be said and celebrated, as now is authorized: yea, though the tenure be in particular, as Littleton hereafter saith, viz., to sing a masse, etc., or to sing a placebo et dirige, yet if the tenant saith the praiers now authorised, it sufficeth."

And so, too, s. 137: "But if an abbot, or prior, holds of his lord by a certaine divine service, in certaine to be done, as to sing a Masse everie Friday in the week, for the soules, ut supra, or every yeare at such a day to sing a placebo et dirige, etc., or to finde a chaplain to sing a Masse, etc., or to distribute in almes to an hundred poor men an hundred pence at such a day; in this case if such divine service be not done, the lord may distreyne, etc. . . . . And such tenure shall not be said to be tenure in frankalmoigne, but is called tenure by divine service."

Your Lordships may also consider s. 169: "Also, by such custome a man may devise by his testament, that his executours may alien and sell the tenements that he hath in fee simple, for a certaine sum, to distribute for his soule."

The editor's note is to the effect that the distribution here meant probably a grant of money to the church to endow

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masses for the testator's soul, a superstition very common in the time of Littleton, and then not inconsistent with any law. He then proceeds to discuss 23 Hen. 8, c. 10, and conjectures that, apart from this statute, such gifts would now be void under the Statutes of Mortmain, or if not within such Acts would be deemed superstitious by the Courts of Equity. Sect. 383 deals with a case, Lib. Ass. 38 Edw. 3, which turned on the conduct of an executor who had failed to sell land in order to distribute the money for the testator's soul.

It is curious that neither Coke nor Hargrave and Butler deemed it necessary to discuss 1 Edw. 6, c. 14 in this connection, and also that Coke did not treat such tenures as extinct but merely changed in the nature of the services. If he had held the view attributed to him upon the strength of his report of *Adams & Lambert's Case* (1), it would naturally have occurred to him (or so it would seem) to mention it in this connection.

Although the statute law contained many provisions restricting the right to give property for ecclesiastical purposes, and also defining or restricting the powers and privileges of the Pope and the clergy, Christianity was of course the established religion, and the validity of gifts for masses is abundantly proved by the terms of statutes, e.g., 31 Edw. 3, st. 1, c. 11, which provides that if a man dies intestate the ordinary shall appoint administrators who can sue for debts due to the deceased "for to administer and dispend for the soul of the dead," and also by the institutions of the common law.

No fundamental changes in doctrinal matters were made during the reign of Henry VIII. His disputes with the Pope were mainly on questions of jurisdiction, and, whatever powers may have been claimed by him or vested in him by statute, it is certain that the mass during the last year of his reign was in all essentials the same as that now observed by Roman Catholics. He himself in his will directed masses to be said for his soul (Froude's History of England, iv., p. 527). There is no sufficient ground for impeaching the authenticity of this

(1) 4 Rep. 104b.

will. Reference may be made to the note at p. 350 of the fourth volume of Lingard's History of England: to the corresponding treatment of the subject in Froude (vii., p. 482), and to the observations upon the same point in the Political History of England, in the volume 1547–1603, p. 5. It is noteworthy that one of the first steps taken in the reign of Queen Mary to restore Roman Catholicism was the passing of the Act 1 M., sess. 2, c. 2, which replaced the mass in the position which it filled during the last year of the reign of Henry VIII.

When Edward VI. came to the throne the mass was still a recognized religious institution in England. On September 22, 1547, special injunctions to the Dean and Chapter of Canterbury were issued containing directions as to the singing of masses. (1) On November 4, 1547, the first Parliament of Edward VI. opened, in accordance with ancient practice, by the celebration of the Mass of the Holy Ghost. (2) The first Act passed in that session was an Act against persons who speak irreverently "against the Sacrament of the body and blood of Christ, commonly called the Sacrament of the Altar," (3) which really combined two measures, one Bill being directed against the prevalent and increasing practice of reviling the mass in an indecent manner, and the other requiring Communion to be administered in both kinds. No Act had been passed which altered in any fundamental particular the law on the subject of masses at the date when the Chantries Act (1 Edw. 6, c. 14) obtained the Royal sanction. The subsequent history of the mass abundantly proves this. On March 8, 1548, appeared the Order of the Communion, which provided "The time for the Communion shall be immediately after the Priest himself has received the Sacrament without the varying of any other rite or ceremony in the Mass (until other order shall be provided), but as heretofore usually the Priest hath done with the Sacrament of the Body." This Order relates to the rite of Communion to be administered during the celebration of mass, and in no way can it be said

(1) Gasquet & Bishop: Edward VI. and the Book of Common Prayer, p. 56.

(2) Gasquet & Bishop, p. 64.

(3) Gasquet & Bishop, pp. 69, 71, 77.

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to condemn or supersede the mass. Indeed, inasmuch as before then Communion could take place at any celebration, public or private, the requirements of notice, and of communication only at a public service, tended to diminish the opportunity of communicating afforded to the laity. (1) The Latin Mass, according to the various rites then in use in England, still remained intact. (2)

The contemporary evidence in support of this proposition is quite clear. Lord Protector Somerset wrote to Bishop Gardiner on June 28, 1548, a letter (3) which contains the sentence: "The questions and controversies concerning the Sacrament of the Altar and the Mass rest at present in consultation," and again in a letter to the Vice-Chancellor of Cambridge University dated September 4, 1548, he refers to the form of mass in use in the Royal Chapel. (4)

The Order of the Communion was a mere temporary measure, and steps were taken almost immediately to provide new services. The First Prayer Book of Edward VI. was drawn up in 1548, and was the subject of debates in both Houses of Parliament. Sweeping changes were made in the form of the mass. The fourth rubric made the wearing of the chasuble (which was the sacrificial vesture) optional, and the entire portion of the mass which constitutes the act of formal oblation, together with the prayers which accompany it, were omitted. (5) It may be argued that this omission marks the point where the mass ceased to exist and the service became Holy Communion, but it is most highly disputable whether its authors so intended it. The name "mass" was retained both in the title and also where it is mentioned in the preamble to the Act of Uniformity, 1549 (2 & 3 Edw. 6, c. 1), and the general acquiescence of the clergy and laity also point to the conclusion that the new rite was a form of mass. The Book of Common Prayer came into force on Whitsunday, June 9, 1549, and, as this was by the Act of Uniformity the only form allowed by law, it follows that if,

(1) Gasquet & Bishop, p. 91.
(2) Gasquet & Bishop, p. 90.
(3) Gasquet & Bishop, p. 129.
(4) Gasquet & Bishop, p. 147.
(5) Gasquet & Bishop, pp. 189, 194, 196.

contrary to the view which I respectfully urge upon your Lordships, this service was not a form of mass, then the celebration of mass was thenceforth forbidden.

There were many who refused to obey the new book, and accordingly further provision to compel its adoption was made by the Act 3 & 4 Edw. 6, c. 10, which recites the establishment of this book and refers to the "old accustomed superstitious service" and requires (inter alia) all obnoxious images and books to be destroyed.

My Lords, this First Prayer Book was a compromise which pleased neither party, and which was obnoxious to the Protestants for many reasons, but principally because it used words in the Communion Service which were generally understood to denote the sacrifice of the mass. The title reads: "The Supper of the Lord and the Holy Communion commonly called the Mass." What became in the Second Prayer Book the Prayer for the Church Militant here on Earth, is in the earlier volume a prayer for the Church, including both living and dead, and it contains the words: "We commend to Thy mercy, O Lord, all other Thy servants which are departed hence from us with the sign of faith and now do rest in the sleep of peace: grant unto them, we beseech Thee, Thy mercy and everlasting peace," a passage which is almost the same as that in the Ordinary of the Mass, but which is entirely omitted in the Second Prayer Book, published in 1552 under sanction of the statute 5 & 6, Edw. 6 c. 1. There can be no doubt that this service was a Communion Service pure and simple, and that the mass had disappeared for the time being from the Book of Common Prayer.

On the death of Edward VI. this country became reconciled to Rome, but on the accession of Queen Elizabeth the statutes of Mary were repealed, thus restoring the Acts of Henry VIII. and Edward VI. (1 Eliz. c. 1). By the Act of Uniformity, 1559 (1 Eliz. c. 2), the Second Book of Common Prayer of Edward VI., as altered, was again made obligatory, and s. 4 of the Act prohibited the use of any other form in any place.

The effect was to render celebration of mass illegal, and there are many instances of people being arrested for attending

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mass (e.g., see Strype, Ann. vol. 1, p. 365), and even the services at the ambassador's chapels were interfered with in order to prevent the attendance there of English subjects. It was not however until 23 Eliz. c. 1 that the saying or singing of masses was expressly declared to be a criminal offence.

From 1559, or at latest from 1581, the mass was an illegal service, and it remained so until 31 Geo. 3, c. 32, but, as was pointed out by Grant M.R. in *Cary* v. *Abbot* (1), that Act contained a proviso that all dispositions of property before considered unlawful should continue to be so, and it was not until the Catholic Relief Act, 1829, and the various Roman Catholic Charities Acts, the first of which was passed in 1832, that Roman Catholics obtained anything like the degree of indulgence which had been conceded to Protestant Dissenters.

It has been necessary to discuss the history of the mass in England in order to consider the true interpretation of the Chantries Act, 1547 (1 Edw. 6, c. 14); but, before that Act is dealt with, it is convenient (if only to avoid misunderstanding) to refer to the statute 23 Hen. 8, c. 10, which is entitled: "An Act for feoffments and assurances of lands and tenements made to the use of any parish church, chapel, or such like." This Act recites the practice of feoffments and other assurances of land to the use of "parish churches, chapels, churchwardens, guilds, fraternities, commonalties, companies, or brotherhoods" whereby "there groweth and issueth to the King our Sovereign Lord, and to other Lords and subjects of the realm, the same like losses and inconveniences, and is as much prejudicial to them, as doth, and is, in case where lands be aliened into mortmain," and provides that all such uses, intents and purposes declared or ordained after March 1 in the same regnal year should be void, but also contains a proviso that any such uses for terms not exceeding twenty years shall be valid. The Act is general in its terms, and its object, on the face of it, is to extend the law of mortmain because of the economic evils which resulted from the obnoxious uses. Even if it be true that, in spite of

(1) 7 Ves. 494.

the express words of the Act, its real object was spoliatory, there is nothing in it which can be relied upon in impeachment of the validity of gifts for masses for the souls of the dead. The Act was repealed by the Mortmain and Charitable Uses Act, 1888.

We are therefore left with the Chantries Act, 1547 (1 Edw. 6, c. 14), as the only Act upon which the respondents can, or do in fact, rely in their attempt to establish the illegality of gifts for masses for the dead. It is necessary to consider its terms in detail.

The title is "An Act whereby certain Chauntries Colleges Free Chapels and the possessions of the same be given to the King's Majesty," and there is a lengthy preamble which sets out in detail the evils which it is intended to remedy. The words are: "Considering that a great part of superstition and errors in Christian religion hath been brought into the minds and estimations of men, by reason of the ignorance of their very true and perfect salvation through the death of Jesus Christ, and by devising and phantasing vain opinions of purgatory and masses satisfactory to be done for them which be departed, the which doctrine and vain opinion, by nothing more is maintained and upholden, than by the abuse of trentals, chantries, and other provisions made for the continuance of the said blindness and ignorance. . . . ."

And in the enacting sections the Act vests in the King, firstly, by s. 2, (1) all manner of colleges free chapels and chantries in existence within five years before the first day of that Parliament except those in the actual possession of Henry VIII. or Edward VI. and those excepted from the Act of Henry VIII. dissolving chantries and not altered by the Commissioners in the manner prescribed, and all manors, lands, rents, tithes, pensions, portions or other hereditaments belonging to them, and also all manors etc., by any assurance, conveyance, will, devise or otherwise had, made, suffered, acknowledged or declared, given, assigned, limited or appointed to the finding of any

(1) *Note.*—These sections are numbered as in Pickering's edition of the Statutes at Large, Cambridge, 1763. In the Statutes of the Realm, s. 1 includes Pickering's s. 2.

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priest to have continuance for ever or wherewith or whereby any priest was sustained or found within that period of five years, and also any annual rents, profits and emoluments within the same period employed, paid or bestowed towards or for the maintenance, support or finding of any stipendiary priests intended by any act or writing to have continuance for ever.

The same is enacted by s. 3 as to lands, hereditaments, etc., given to the finding of a priest or priests for terms of years subject to the rights of reversioners at the expiration of such terms.

The Act then proceeds, by s. 4, to forfeit to the King all lands rents or other hereditaments at any time theretofore given, etc., to be employed wholly for the finding or maintenance of any obit or anniversary or other like thing, intent or purpose for ever or for the finding or maintenance of any light or lamp in any church or chapel to have continuance for ever; and generally the Act vests in the King all property held for such purposes or belonging to the foundations thereby vested in him.

Except in s. 17, which deals with personalty belonging to such foundations, the Act only deals with realty, chattels real, or money arising out of, or charged upon, realty. It only applies to existing colleges, free chapels and chantries in existence within the five years mentioned, and with one exception does not purport to deal with the future, and indeed by s. 37 it clearly recognizes the existence of obits not annihilated by its provisions. There is not a word in the enacting parts which prohibits such gifts in the future, and it seems certain that the Act was not so construed at the period when it came into operation.

Bishop Gardiner, preaching before Edward VI and his Council on June 29, 1548, said: (1) "And if ye ask concerning the Masses that were wont to be said in monastries that, if the Masses had been good, the monastries had not been put down, to that, I say that when the number of the monastries went away there was no prejudice to the Mass, no more think I now that the Chantries be gone. Though the Chantries be

(1) Gasquet & Bishop, p. 83, n.

transposed to another use, yet the Mass is not condemned." Had the Act been believed to invalidate gifts for masses, it is hardly conceivable that it should have escaped the repealing energy of Queen Mary, during whose reign many Roman Catholic foundations were restored or established. On the accession of Queen Elizabeth all such were vested in the Crown by the Act 1 Eliz. c. 24, which also provided that all lands, sums of money, etc., given since the death of King Edward VI. for a priest to say masses or for obits or lights should be vested in the Crown. This Act did not, however, prohibit such gifts in the future.

An argument, apt for the purpose of the respondents, upon the Chantries Act, 1547, must, therefore, be based either on the preamble, or on some peculiar construction of the words of the Act other than the plain natural meaning.

The preamble is an important part of a statute, and plays a definite part in the construction of the enacting part; but it is not itself the enacting part and cannot have that effect. As was said by Tindal C.J., in his opinion in the *Sussex Peerage Case*: (1.) "The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (*Stowel* v. *Lord Zouch* (2), is 'a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.'" Applying that principle to the present Act, it is clear that the existence of chantries was abhorrent to the framers of the measure, and that they intended to destroy them. They might have chosen many ways of effecting their purpose, but the method which they

(1) (1844) 11 Cl. & F. 85, 143. (2) (1569) Plowd, 353, 369.

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did adopt makes it clear that in their view the evil could be corrected by confiscating the peccant foundations and their property. There is no trace of an intention to prohibit such gifts in the future; and the preamble cannot be construed so as to enact what Parliament did not in fact enact, whether the omission was deliberate or by inadvertence.

Nor can any forced or strained construction be put upon the Act itself. If the cases are carefully considered they do not lead to the conclusion that the Act, either by express words or by necessary implication, prohibited such gifts in the future. Many cases were decided on the Act, but the one upon which reliance is chiefly placed is *Adams & Lambert's Case*. (1) This was an action of ejectment, and raised the question of the effect of the Act upon a devise of one John Barton the elder, dated June 5, 1431, of certain tenements in the town of Buckingham, to relatives of his on condition of finding a priest to say masses for the souls of himself and others. The report is not a report in the modern sense, but rather a dissertation upon the construction of the statute. Lord Ellesmere said of it that "he" (Coke) "hath so darkened the case by many intricate differences, whereof the Court that argued the same, did never dream." The point in dispute was whether the whole lands or only so much of the issues thereof as were devoted to the purpose mentioned were given to the King, and the instructiveness of the case is drawn from the discussion of the circumstances which affect the application of the Act. All the various devises and uses which Coke discusses are dealt with in the present tense, so that it is quite easy to imagine that he is laying down principles and distinctions as to such gifts which might then or thereafter be made; but it is clear from the dates of the gifts in the cases he cites and comments upon that they are all prior in date to the Act, and the present tense is not intended to mean that any gifts not then made are governed either by the Act, or by the reason of the Act, or by some principle of law which is not expressed but must lie implicit in its terms. This explanation also applies to his general statements upon

(1) 4 Rep. 96*a* and 104*b*.

the intent of the Act, as, e.g., the statement on fo. 109*b*, that the intent of the Act was to prohibit all "superstitious uses, which were public in churches for the general prejudice which might accrue by them; for malum quo communius eo pejus, and not to prohibit private prayers in their chambers, or other private places, which could not tend to so dangerous an example," and on fo. 111*b*, "the intention of the Act (as hath been said, and so it ought to be expounded) was to take away all such superstition."

It appears from the report of the same case in Moore (1) that there was no question raised in the case as to any uses which were or might be created after the Act. This case, therefore, is one of several decided during the reign of Elizabeth on the construction of the statute, and its application to chantries existing during the period mentioned by the statute is plainly not an authority for the proposition that the Act or any principle deducible from the Act has a prospective operation.

The real author of this construction of the statute appears to have been Duke, who in his work on Charitable Uses (1st ed., 1676, p. 106; Bridgman's ed., p. 350), ch. 7, s. 1, says: "If any manors, lands, tenements, rents, annuities, pensions, profits, hereditaments, goods, chattels, money or stocks of money, have been, or shall be given," etc., "to have continuance for ever, or for a time only, towards, or for the finding, or maintenance of a stipendiary priest; or for the maintenance of an anniversary or obit, or of any light or lamp in any church or chapel, or any like intent; these, and such like gifts and dispositions as these, are not to be accounted charitable uses (intended by the purview of this statute) but superstitious uses intended by the statute of 1 Edw. 6, c. 14. What is disposed and settled in any such course, is forfeit, and given to the King.

"And therefore, if at any time heretofore, any such thing hath been given, or hereafter shall be given by any man, by his last will, at his death, or by act executed in his lifetime to any person, sole or corporate, in fee simple, fee tail for life or years, to the intent, or upon condition to find a chaplain,

(1) Moo. K. B. 648.

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and have the service of a priest or other man to say Mass, or to have a priest or other man, to pray for the soul of any dead man in such a church of other place; or to have or maintain perpetual obits, lamps, or torches, etc., to be used at certain times to help to save the souls of men, out of the supposed purgatory; these, and such like uses as these are not, nor shall they be said to be charitable uses within the intendment of the statutes, made and provided for the preservation and execution of such uses. For these are looked upon, and accounted in law, for superstitious uses. And therefore all these and such like uses as these are void. And the lands so given to such superstitious use, are by other statutes given and forfeited to the King, and he shall have them. And yet so, that if there be any charitable use intermixed with the superstitious use, and they may be distinguished, there the King shall have only so much as is given to the superstitious use, and not that which is given to the charitable use also. And for this, see Cook 4, 104 *Adams & Lambert's Case*; 15 Rich. 2, c. 5; 37 Hen. 8, c. 4; 1 Edw. 6, c. 14; Crook, 1 Part 180; Bridgm. Rep. 105; Crook, 2 Part, 51, 52. Where (to our present purpose) these things are agreed upon, 1 Edw. 6, c. 14."

Sir Francis Moore, in his Expositions on the Act 43 Eliz. (printed as an Appendix to Duke, 1676 ed.), at pp. 131–2 states that such gifts are not within that Act, and were deliberately omitted lest such gifts should, on change of times, find their way into the King's Treasury: "For religion being variable, according to the pleasure of succeeding princes, that which at one time is held for orthodox, may at another, be accounted superstitious, and then such lands are confiscate, as appears by the Statute of Chanteryes, 1 Edw. 6, c. 14." It seems therefore, according to this view, that Parliament, in order to prevent the risk that the pious intentions of donors might be defeated by possible confiscation, determined with grave irony that if the donors expressed such intention confiscation should become inevitable.

My Lords, I think that the plain truth of the matter is that when the Reformation became an accomplished fact the

general notion was that only one form of religion could be safely allowed, and, therefore, there was an instinctive feeling that such gifts should not be permitted. Lawyers accordingly sought for a juridical basis, and Duke's statement is one of the attempts to find such a basis. The absence of a statute expressly in point or of any satisfactory ancient precedent led to uncertainty, and to a desire to support the doctrine on some undoubted authority, appealed to because, though not precisely in point, it had some show of relevance.

Quite apart from this attempt to justify the principle that such a rule was the law, the Courts early in the reign of James I. placed the law as to superstitious uses on a sound juridical footing, and the attempt above referred to appears to have remained without any substantial effect until the decision in *West* v. *Shuttleworth* (1) in 1835.

No survey of this important subject would be complete which failed to examine, however, shortly the authorities upon these and cognate subjects which were delivered between the legislation of Queen Elizabeth and the decision in *West* v. *Shuttleworth*. (1)

Boyle on Charities, p. 242, thus defines a superstitious use: "A superstitious use may be defined generally to be one which has for its object the propagation or the rites of a religion not tolerated by the law." This is not exhaustive, but will serve as a working definition.

The Chantries Act, 1547, had terminated all chantries at the date of its passing. Those which had been restored or newly established during the reign of Queen Mary were confiscated by 1 Eliz. c. 24, practically at the same moment as the reversal of the Marian religious legislation. During the reign of Queen Elizabeth statutes had been passed making it clear that the celebration of mass was illegal, but no statutes had been passed making it clear that dispositions such as those under discussion were void. Indeed it would seem that 43 Eliz. c. 4 had been drawn so as to avoid any legislative pronouncement.

In these circumstances two cases fell to be decided in

(1) 2 My. & K. 684.

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1606. The first was *Croft* v. *Evetts* (1). The date of the assurance is not given, but the settlor is described as a popish recusant, which indicates that the assurance was made after the penal laws of Queen Elizabeth. The facts were, shortly, that one William Evetts before his death in order to disinherit the plaintiff (his heir at law) conveyed certain lands to divers popish recusants upon trust after his own and his wife's death to apply the revenues "upon poor scholars in Oxford and Cambridge, or elsewhere, such as study and profess or shall hereafter intend to profess and study Divinity, and enter into holy orders according to the true intent and meaning of the said William Evetts." On the case coming for hearing before Lord Ellesmere, the Lord Chancellor, he directed it to be reargued before himself, the Master of the Rolls, and the two chief justices. The King's counsel were also present, and, after full argument, it was decided that conveyances made on such trusts were pernicious and dangerous to the State, and that if the profits of the lands could be so applied they would be bestowed upon traitors, Jesuits, seminary priests and others being enemies to the State, and that the precedent would be too pernicious and dangerous an example to be tolerated, and, as such trusts were void and repugnant to law, and there was no intention that the feoffees should take anything to their own use, the lands were declared to belong to the plaintiff after the death of the settlor's widow, and the feoffees were ordered to convey the lands accordingly.

The other case was *Lady Egerton's Case.* (2) A fine had been levied by a recusant to another in Queen Elizabeth's time in trust that the profits might be employed upon a hospital of religious persons which should be renewed "when the times should serve"; and in the meantime the profits were to be employed to the relief of poor people "by the discretion of the conusee and his heirs to the intent of the conusor." The Court decreed the land to the heir at law on the ground that it was apparent that the donor was a recusant, and that the employment of the money must be according to his intent,

(1) (1606) Moo. K. B. 784.

(2) (1605) Duke on Charitable Uses (Moore's Exposition), p. 133.

which could be no other than the relief of poor recusants, and that such a disposition, not being agreeable to the law, the use could not be charitable within the meaning of statute 43 Eliz.

The principle of these cases is that no disposition of property for purposes which are contrary to the law can effect the intended purposes, even if the statutes merely prohibit the purpose and do not in terms prohibit the settlement of property for such purpose.

My Lords, I have on the whole formed the opinion that it is upon this principle that the subsequent cases are to be supported. No justification for refusing to uphold the settlements of Dissenters, Jews, and others who do not believe in the doctrines of the mass, can be founded upon a statute which was only aimed at certain practices and ceremonies of the Roman Catholic Church. When it is borne in mind that the Church of England was the only lawful form of religion until the Toleration Act, the all-embracing scope of this principle can readily be understood. It explains indeed the series of cases following. The decision in *Attorney-General* v. *Baxter* (1) turned upon the validity of a devise in favour of sixty poor ejected ministers to be named by Baxter. The Attorney-General argued that it was void because it tended to encourage and perpetuate schism, and the Lord Chancellor held the bequest void. It appears from the note 2 Vern. at p. 105, where the case is mentioned as *Attorney-General* v. *Hughes*, that in 1689 the Lords Commissioners reversed this decision. Lord Eldon, in delivering judgment in *Moggridge* v. *Thackwell* (2), said, on the authority of Lord Hardwicke's notes in *De Costa* v. *De Pas* (3), that the reversal was on the ground that the bequest was a mere legacy.

Attorney-General v. *Guise* (4), is an extreme example of the principle. Objection was taken to a charity to educate and ordain Scots to go to Scotland in order to propagate the Church of England there. The ground was that, inasmuch

(1) (1684) 1 Vern. 248.
(2) (1803) 7 Ves. 36, 76.
(3) (1754) Amb. 228; 2 Swans. 487*n*.
(4) (1692) 2 Vern. 266.

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as by statute Presbyterianism was the established religion in Scotland, the trust had thereby become illegal. Lord Somers upheld the objection and made a decree for a scheme (which is printed in 2 Collyer at p. 670). This case came before more than one Lord Chancellor—e.g., Lord Hardwicke in 1744 (1), Lord Henley in 1759 (2), and was cited in a case which also arose on the scheme *Glasgow College* v. *Attorney-General.* (3) Episcopacy had been almost forbidden in Scotland. See *Greenshield's Case* (4), which led to the Act 10 Anne, c. 7, being passed to enable Episcopalians in Scotland to worship in their own proper fashion.

Jones' Case (5) was decided on an information alleging that a lease and release of lands covered an intention to pass the estate for the benefit of Roman Catholic priests in England. This was filed in the reign of James II., and alleged that the purpose was unlawful and superstitious. The lands were adjudged to the King in Trinity Term, 1688. The Lords dismissed the appeal, which claimed that the lands being given to a superstitious use, should go to the next of relation or in the alternative that a charity should be appointed consonant with the Protestant religion.

Lady Portington's Case (6) was decided on an absolute devise, but the jury on an inquisitio post mortem found for the King on the ground that the devise was in fact for superstitious uses. The case was, it would appear, decided in the Exchequer (7) and in the King's Bench (8). The Exchequer held that the lands went to the King, and the King's Bench that they did not. The report in 1 Salk. assigns as the ground of the decision that "the King, as the head of the commonwealth, is obliged by the common law . . . . to see that nothing be done to . . . . the propagation of a false religion."

The report at 3 Salk. 334 sets out several propositions

(1) 9 Mod. 407.
(2) 2 Coll. 672.
(3) (1848) 1 H. L. C. 800, 820.
(4) 19 Lords' Journal 246.
(5) (1690) reported [1893] 2 Ch. 49, n, and cited as *Gates & Jones' Case* in 2 Vern. 266.
(6) (1693) 1 Salk. 162; 3 Salk. 334: 12 Mod. 31.
(7) 1 Salk. 163.
(8) 3 Salk. 334.

which appear to afford a headnote. The first of them is as follows :—

"1. All superstitious uses are void, and given to the King by the Statute of Ed. 6., which extends only to such uses as were made before that time, so that all superstitious uses since that statute was made, though they are void, yet they are not forfeited to the King." It is however clear from the terms of the report and the authority cited in the judgment of Holt C. J., namely, *Croft* v. *Evetts* (1), that the decision was based not on the statute but on the common law principle, and indeed if anything it suggests the view that the Act of Edward VI. has no application at all to such cases.

De Costa v. *De Pas* (2) was a bequest to a trustee to invest and apply the income in maintaining an assembly for daily reading the Jewish law and for advancing and propagating the Jewish religion. The report in Ambler was said by Lord Eldon in *Moggridge* v. *Thackwell* (3) not to be very accurate, and he cited Lord Hardwicke's notes. The report in Swanston is taken from Cox's notes in Lincoln's Inn Library. Lord Hardwicke was of opinion that the cases had gone further than the statute of Edward VI., and it would indeed be very difficult to attack this bequest on the words of that Act. If the principle of *Croft* v. *Evetts* (1) is applied then the case becomes clear and intelligible.

De Garcin v. *Lawson* (4) arose upon a codicil giving legacies to several Roman Catholic establishments both in England and abroad. The legacies were considered void, those to foreign establishments as being contrary to the policy of this country, the others because they were given either to individuals in characters with respect to which they could not claim, or to an illegal establishment. The argument against the Crown was that, as the Act 1 Edw. 6, c. 14, gave to the Crown only such superstitious uses as were then subsisting, subsequent superstitious uses were merely void. The case did not proceed to judgment as it was very doubtful

(1) Moo. K. B. 784.
(2) Amb. 228; 2 Swans. 487*n*.
(3) 7 Ves. 81.
(4) (1798) 4 Ves. 433*n*.

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whether there would prove to be sufficient funds to pay these legacies.

Smart v. *Prujean* (1) concerned a devise by a Roman Catholic priest on trusts which were held not to have been sufficiently incorporated in the will and therefore to have failed. Lord Eldon expressed the view that, if a legacy were given for such purpose as the superior of a convent or her successor should judge most expedient, the fact that it was given in that character was sufficient to show that the gift was for a superstitious use.

In *Cary* v. *Abbot* (2) a bequest for the education and maintenance of poor children in the Roman Catholic faith was considered. Sir William Grant M.R. pointed out that although the Roman Catholic religion had received a considerable degree of toleration from the statute 31 Geo. 3, c. 32, yet that Act contained a provision that all dispositions before considered unlawful should continue to be so. He continued: "There is no statute making superstitious uses void generally. The statute of Edward VI. relates only to superstitious uses of a particular description then existing. The statute of Henry VIII. (23 Hen. 8, c. 10) relates only to assurances of land to churches and chapels; which, if for a longer term than twenty years, it declares absolutely void. The statute 1 Geo. 1, c. 55, was only temporary."

Doe v. *Hawthorn* (3), was an action construing the lease of a dissenting meeting house. It was held that the lease was void either as a superstitious use within 23 Hen. 8, c. 10, or as a charitable use within 9 Geo. 2, c. 36. Both of these Acts are now repealed.

In *De Themmines* v. *De Bonneval* (4), it was decided that a trust to apply the dividends of certain securities to the printing and publishing a book which inculcated the absolute and inalienable supremacy of the Pope in ecclesiastical matters was void, as being contrary to the policy of the law and in the nature of a superstitious use. Sir John Leach M.R. distinguished this trust from the case of a treatise inculcating

(1) (1801) 6 Ves. 560, 567.
(2) 7 Ves. 490, 495.
(3) (1918) 2 B. & Ald. 96.
(4) (1828) 5 Russ. 288, 292.

the general doctrines of the Roman Catholic Church. It was (in his view) against the policy of the country to encourage any work which asserts the absolute supremacy of the Pope in ecclesiastical matters over the sovereignty of the State.

Such, my Lords, was the case-law at the date of the passing of the Catholic Relief Act, 1829. It is convenient now to refer to two statutes: 1 Geo. 1, c. 50, and 31 Geo. 3, c. 32. The former Act was intended to raise money at the expense of Roman Catholics, and it approached this object among other roads by appointing commissioners to find out what lands, etc., were then held for superstitious uses and to confiscate them to the King for the public use. This Act did not profess to have any operation beyond the existence of the commission and has long since undergone exhaustion. 31 Geo. 3, c. 32, permitted religious worship according to the tenets of the Roman Catholic Church, but it was very closely guarded by exceptions and precautions. Sect. 17 provided that no change was authorized in the holding of land, etc., so that neither Act can be relied upon as altering the law in any relevant particular. The Catholic Relief Act, 1829 (10 Geo. 4, c. 7), is a much wider measure, and subject to certain exceptions allows full freedom of worship to Roman Catholics. The provision of the Act 31 Geo. 3, c. 32, as to the disposition of property was not repeated. It was now impossible to apply the doctrine of *Croft* v. *Evetts* (1) to the full extent, and as Roman Catholicism had become a religion recognized by the law, the Courts were thereafter constrained to consider later cases from a new angle.

Bradshaw v. *Tasker* (2) is really a case before the Act. The testator, who died in 1823, had made bequests for Roman Catholic schools. Lord Brougham held that the case did not come within s. 3 of the Roman Catholic Charities Act, 1832, that this Act was retrospective, and therefore that the bequests were valid. It follows that he was of opinion that, apart from the 1832 Act, the bequests were invalid.

The Roman Catholic Charities Act, 1832 (2 & 3 Will. 4, c. 115), is entitled: "An Act for the better securing the chari-

(1) Moo. K. B., 784. (2) (1834) 2 My. & K. 221.

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table donations and bequests" of Roman Catholics. After reciting the Toleration Act and other Acts for the relief of Dissenters and the expediency of removing doubts respecting the right (of Roman Catholics) to acquire and hold property necessary for religious worship, it provides that Roman Catholics shall be on the same footing as Protestant Dissenters in respect to their schools and places for religious worship, education and charitable purposes, and not further or otherwise; but by s. 4 the sections (28–36) of the Act of 1829 against Roman Catholic religious orders were maintained, and by s. 5 the then existing Mortmain Acts were affirmed.

The position, therefore, was that the Roman Catholic religion was recognized as one which could be practised without any penal consequences or breach of the law. The first case after the last-named Act in which the doctrines with which your Lordships are concerned were examined was *West* v. *Shuttleworth* (1), decided by Sir Charles Pepys, afterwards Lord Chancellor Cottenham. This decision (not the old cases) is the real foundation for the proposition that bequests of the kind now under consideration are invalid.

The question was as to the validity of provisions of the will of a testatrix who had given bequests to priests for prayers and masses and directed the residuary estate to be applied in providing funds for the ministers of certain named Roman Catholic chapels for prayers for the souls of the testatrix and her dead husband and, so far as not required for such purposes, in promoting the knowledge of the Roman Catholic religion among the poor and ignorant of certain named districts. The Master of the Rolls held that the bequests to the priests and ministers of chapels were void, but that the ultimate residuary gift was valid. The desire of the testatrix to benefit her soul was indeed defeated; but her desire to have others taught that such a desire was in accordance with true religion was, not without paradox, upheld. The case was fully argued, but the arguments afforded little foothold to those who contend that gifts to superstitious uses, not within the statute of Edward VI., were void as being contrary to the policy

(1) 2 My. & K. 684.

of the law. The argument for the validity of the bequests was put upon the ground that, admitting such gifts to have been invalid, they had ceased to be so by reason of the Catholic Relief Act, 1829, as explained by the Act of 1832. The rule (so it was contended) was then to be taken as laid down in the well-known judgment of Lord Eldon in *Attorney-General* v. *Pearson*. (1) The earliest case cited in argument was *De Costa* v. *De Pas* (2), and learned counsel do not appear to have cited, or examined, any of the earlier authorities in order to unfold the dubious genesis of the rule. Sir C. Pepys' judgment on the superstitious uses (3) assumes that the rule is one which is binding, unless altered by the statute of 1832, and taking the view that a bequest to a priest or the minister of a chapel, although for religious purposes, was not a gift to "schools, places for religious worship, education and charitable purposes," naturally came to the conclusion that the gifts were invalid. It is not clear upon what authority he made the statement that the statute of Edward VI. "has been considered as establishing the illegality of certain gifts"; but the reference to Duke on Charitable Uses suggests that he had consulted Duke's treatise and there found an explanation of certain cases, which did not fall within the terms of the statute, and for which he could not find any satisfactory reason. This case is really the earliest authority. Lord Cottenham, in 1841, had occasion to deal with a will which came into force before 1 Edw. 6. He held that the gift would have been void under the authority of *Adams & Lambert's Case* (4), and the cases cited in Coke's Reports, but for letters patent and a statute which cured the defect: (*Attorney-General* v. *Fishmongers' Company* (*Kneseworth's Will.*) (5)

The case of *Attorney-General* v. *Todd* (6) was concerned with the estate of a testatrix who in 1680 devised her lands subject to a rent charge and by a memorandum directed the devisee and the holder of the rent charge to carry out certain trusts

(1) (1817) 3 Mer. 353, 409.
(2) Amb. 228.
(3) 2 My. & K. 697.
(4) 4 Rep. 104*b*.
(5) 5 My. & Cr. 11.
(6) (1837) 1 Keen, 803.

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(inter alia) for a Roman Catholic priest. Lord Langdale M.R. held that as litigation was pending at the date of the passing of the 1832 Act, that statute, by s. 3, did not apply, and held the trust invalid without giving reasons.

Heath v. *Chapman* (1) was a decision of Kindersley V.-C. He was sitting as a judge of first instance and, as the question was as to the validity of certain trusts created inter vivos for the purpose (inter alia) of paying annuities to certain named Roman Catholic churches in England and abroad for masses and requiems for the souls of certain named persons, and the poor dead, he was bound by *West* v. *Shuttleworth.* (2) He examined however the reasons for the rule and said: "It is quite clear that, at all events before the 2 & 3 Will. 4, it was commonly assumed to be the law . . . . that a gift to a priest for masses for the repose of the testator's soul, or a gift to a priest to say masses generally, was superstitious and void. The way in which this came to be the law is this: at the time of the passing of the statute of Edward 6 such gifts were void. That statute declares, as to certain uses, not that they are void—it assumes that—but that the property given to such uses is to belong to the Crown; and the Courts of law have subsequently put this interpretation on that statute, not that it actually declares such trusts to be void, but that it stamps on all such trusts, whether created before or subsequently to the statute, the character of illegality, on the ground of being superstitious; it gives to the Crown certain property devoted to such uses, but it stamps *all* such uses as superstitious and void. That has been the view of the Courts of law; and Lord Cottenham, when Master of the Rolls, in referring to the cases collected in Duke, refers to the cases where that is stated." The Vice-Chancellor does not appear to have realized that *Adams & Lambert's Case* (3) was a decision on the statute itself, and, apart from his erroneous assumption that at the date of the passing of the Chantries Act masses were illegal, he seems to have assumed further that the cases could only have been decided on the strained interpretation of the

(1) 2 Drew. 417, 423, 424. (2) 2 My. & K. 684.
(3) 4 Rep. 104*b*.

Act which he stated in the terms cited above. My Lords, this reasoning cannot be supported. The Vice-Chancellor then discussed the Act of 1832 and its effect upon such trusts, and came to the conclusion that, though the statute was intended to place Roman Catholics on the same footing as Dissenters, as to their places of worship, that does not apply to the purposes to which such places are devoted. "No doubt, if property is given for the use of a place of worship, that is good; but the statute leaves quite untouched the case, where property is given for superstitious uses." He ended by stating his entire concurrence with the reasoning of Lord Cottenham in *West* v. *Shuttleworth*. (1) It is not doing Kindersley V.-C. an injustice to say that his decision adds nothing to the earlier case which he followed.

In 1860 a new Act was passed to amend the Act of 1832, providing that where property was held as trust for purposes of the Roman Catholic religion, part of which were valid and part invalid, as being for superstitious uses, then so much as was held applicable to the void uses should be applied under a scheme to be settled by the judge for purposes of the Roman Catholic religion.

At one period of the debate the suggestion was thrown out that the "superstitious trusts" referred to in the Act of 1860 must mean trusts of the kind which were condemned by the decision in *West* v. *Shuttleworth* (1), and the intention was therefore indicated that Parliament had stamped upon such trusts the character attributed to them in that much-discussed case. My Lords, I am not able to accept this view. When the Act says, "trust or provision deemed to be superstitious" I am of opinion that it means a trust or provision rightly and lawfully so deemed. Holding the view which I have formed upon the merits of the decision in *West* v. *Shuttleworth* (1), I necessarily conclude that these trusts were not superstitious, and I therefore leave the words of the Act to operate in other ways. Alternatives were suggested to us during the argument, and I think an ingenious person could multiply instances in which even to-day dispositions connected

(1) 2 My. & K. 684.

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with relics, the veneration of saints or the sustenance of miracle producers might be held to be invalid. But I do not find it necessary to attempt a conclusion upon any of these matters, because, in my view Parliament simply intended e cautela to give to Roman Catholics this advantage, that if any trusts hereafter purporting to benefit Roman Catholics should be held superstitious the property so disposed should be applied cy-près.

The Act of 1860 was not referred to in the case of *In re Blundell's Trusts* (1), which arose in the following way. Romilly M.R. had decided a point arising on trusts for Jewish purposes (*In re Michel's Trust* (2)), and in the course of his judgment had expressed obiter the view that since the recent legislation as to Roman Catholics the old cases upon superstitious uses were no longer law, but when the point arose in *In re Blundell Trusts* (1) he considered the authorities, and found that he was bound by *West* v. *Shuttleworth* (3), and accordingly followed it. This course was adopted in the subsequent cases of *In re Fleetwood* (4) and *In re Elliott* (5), and the late Lord Parker of Waddington in his judgment in *Bowman* v. *Secular Society* (6), quite recently uttered a dictum, obiter without hearing argument on the point, to the effect that it was unlawful to procure masses to be said for the testator's soul.

My Lords, this series of authorities has led me, after the most anxious consideration, to several conclusions :—

(1.) That at common law masses for the dead were not illegal, but on the contrary that dispositions of property to be devoted to procuring masses to be said or sung were recognized both by common law and by statute.

(2.) That at the date of the passing of 1 Edw. 6, c. 14, no Act or provision having the force of an Act had made masses illegal.

(3.) That 1 Edw. 6, c. 14, did not itself make masses illegal, or provide that property might not thereafter be given for the purpose of procuring masses to be said or sung. It merely

(1) 30 Beav. 360.
(2) 28 Beav. 39.
(3) 2 My. & K. 684.
(4) 15 Ch. D. 594, 609.
(5) [1891] W. N. 9.
(6) [1917] A. C. 437

confiscated property then held for such and similar purposes. Subsequent legislation was passed to confiscate property afterwards settled to such uses. This is certainly true of 1 Eliz. c. 24, and may be true of 1 Geo. 1, c. 50.

(4.) That, as a result of the Acts of Uniformity, 1549 and 1559, masses became illegal. The saying or singing of masses was a penal offence from 1581 to 1791, and no Court could enforce uses or trusts intended to be devoted to such uses.

(5.) That neither contemporaneous exposition of the statute 1 Edw. 6, c. 14, nor any doctrine closely related to it in point of date, placed upon it the construction adopted in *West* v. *Shuttleworth*. (1) The principle of that decision is certainly affirmed in Duke and in Roper on Legacies, but the authorities cited on its behalf not only do not support it, but in some cases contradict it.

(6.) That the substratum of the decisions which held such uses and trusts invalid perished as a consequence of the passing of the Catholic Relief Act, 1829, and thereafter your Lordships may give free play to the principle cessante ratione legis cessat lex ipsa.

(7.) That the current of decisions which held that such uses and trusts are ipso facto superstitious and void begins with *West* v. *Shuttleworth* (1), and is due to a misunderstanding of the old cases.

If there were, in fact, an unbroken line of authorities dating back 300 years, then it would have been a matter for grave discussion whether this House, in accordance with well recognized principles, would consent to break that chain. The authorities, however, are only uniform in result. Some depend upon statutes, some on the principle that no religion other than that by law established can be recognized and protected by the Courts, while others depend upon a misunderstanding of the ancient decisions.

West v. *Shuttleworth* (1) is not such a decision. The nearest analogy is that of *Sion College* v. *London Corporation* (2), which was reversed in *Associated Newspapers* v. *London*

(1) 2 My. & K. 684.

(2) [1901] 1 K. B. 617.

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Corporation (1), because it was considered that the old decisions upon which the Court of Appeal relied in the *Sion College Case* had not the effect attributed to them in the Court of Appeal.

I have carefully and respectfully considered the authorities collected by my noble friend Lord Wrenbury in his judgment. The principle upon which he founds his conclusion is perhaps stated in its widest terms by Jessel M.R. in *Ex parte Willey* (2), where he says: "The judge . . . . must not allow any number of dicta, or even dicisions which are not binding on him, to affect his judgment, except in one peculiar case . . . . Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs."

In *Hebbert* v. *Purchas* (3), Lord Hatherley L.C. in delivering the judgment of the Board on another question raised as to the Reformation settlement said: "Through the researches . . . . a clear and abundant expositio contemporanea has been supplied, which compensates for the scantiness of some other materials for a judgment. It is quite true that neither contrary practice nor disuse can repeal the positive enactment of a statute, but contemporaneous and continuous usage is of the greatest efficacy in law, for determining the true construction of obscurely framed documents. In the case of *The Attorney-General* v. *Mayor of Bristol* (4) Lord Eldon observes: 'Length of time (though it must be admitted that the charity is not barred by it) is a very material consideration, when the question is, what is the effect and true construction of the instrument? Is it according to the practice and enjoyment which has obtained for more than two centuries, or has that practice and enjoyment been a breach of trust?' We may ask in

(1) [1916] 2 A. C. 429.
(2) 23 Ch. D. 127.
(3) L. R. 3 P. C. 605, 650.
(4) (1820) 2 Jac. & W. 294, 321.

like manner what is the true construction of the Act of 1662 and of the Rubric which it sanctioned? Is it according to the practice of two centuries, or was the practice a continual breach of the law, commanded and enforced by the Bishops, including the very Bishops who aided in framing the Act?"

In *Morgan* v. *Crawshay* (1) Lord Westbury stated the rule in these terms: "If we find a uniform interpretation of a statute upon a question materially affecting property, and perpetually recurring, and which has been adhered to without interruption, it would be impossible for us to introduce the precedent of disregarding that interpretation. Disagreeing with it would thereby be shaking rights and titles which have been founded through so many years upon the conviction that that interpretation is the legal and proper one, and is one which will not be departed from."

Lord Herschell's judgment in *Tancred, Arrol & Co.* v. *Steel Co. of Scotland* (2), applied the rule to the law of contract. He said: "I think that that doctrine having been laid down so long ago, whether it rests upon any sound basis or not, it would be most improper to depart from it now, because one would be really altering the contract between the parties; for we have a right to suppose that they have entered into it upon the basis of that which for nearly a century has been understood to be the law."

In *West Ham Union* v. *Edmonton Union* (3), a case relating to the settlement of paupers, Lord Loreburn L.C. said: "I ought to say that, in my opinion, the cases which governed the decisions in the Courts below do lead to the conclusion which they reached. . . . . Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. *But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based,* and practical injustice in the consequences that must flow from them,

(1) L. R. 5 H. L. 320. (2) 15 App. Cas. 125, 141.
(3) [1908] A. C. 1, 4, 5.

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I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them."

In my view it is undoubtedly true that ancient decisions are not to be lightly disturbed when men have accepted them and regulated their dispositions in reliance upon them. And this doctrine is especially deserving of respect in cases where title has passed from man to man in reliance upon a sustained trend of judicial opinion.

But this, my Lords, is not the present case. If my view is well founded citizens of this country have for generations mistakenly held themselves precluded from making these dispositions. I cannot conceive that it is my function as a judge of the Supreme Appellate Court of this country to make error perpetual in a matter of this kind. The proposition crudely stated really amounts to this, that because members of the Roman Catholic faith have wrongly supposed for a long period of time that a certain disposition of their property was unlawful, and have abstained from making it, we, who are empowered and bound to declare the law, refuse to other members of that Church the reassurance and the relief to which our view of the law entitles them. My Lords, I cannot and will not be a party to such a proposal.

The conclusion therefore, so far as I am concerned, is that a gift for masses for the souls of the dead ceased to be impressed with the stamp of superstitious use when Roman Catholicism was again permitted to be openly professed in this country, and that thenceforth it could not be deemed illegal. This is not to say that there are now no superstitious uses, or that no gift for any religious purpose, whether Roman Catholic or other, can be invalid. Such cases may arise and will call for decision when they do arise.

A third point remains, and this may be briefly dealt with. The respondents contend that all the gifts, except that to the Westminster Cathedral, were bad, as being to orders bound by monastic vows: Catholic Relief Act, 1829, s. 28; Roman Catholic Charities Act, 1832, s. 4; and Roman Catholic Charities Act, 1860, s. 7.

I do not think it necessary to examine this contention or the cases which were cited to us for two reasons :—

(1.) The respondents do not raise the point in their case, though they certainly would have done so had they placed substantial reliance upon it ;

(2.) They have not placed before us, as was their duty, any evidence sufficient to establish the facts which are necessary in order to found her contentions of law.

My Lords, in my opinion the cumulative effect of the various Emancipation Acts is to remove from the doctrines of the Roman Catholic faith every stigma of illegality. Gifts inter vivos or by will to build a Roman Catholic church or to erect an altar have long been allowed. I am content that my decision should not involve your Lordships in the absurdity that a Roman Catholic citizen of this country may legally endow an altar for the Roman Catholic community, but may not provide funds for the administration of that sacrament which is fundamental in the belief of Roman Catholics, and without which the church and the altar would alike be useless.

My Lords, I am of opinion that this appeal must be allowed with costs, and I move your Lordships accordingly.

LORD BUCKMASTER (read by LORD PARMOOR). My Lords, Edward Egan was an Irishman, domiciled in England, who lived and died in the consolations of the Roman Catholic faith. He made his will on November 29, 1916, and thereby, among other bequests, gave 200*l.* to the cathedral for masses and 200*l.* and the residue of his estate to the Jesuit Fathers, Farm Street, for masses. He also made certain bequests to the Dominican and the Franciscan Fathers. He died on December 27, 1916, and the question raised on this appeal is as to the validity of the gifts to the cathedral and the Jesuit Fathers. They have been declared invalid by Eve J. and by the Court of Appeal, but in neither case did the judgments depend upon any investigation of the law. Both Courts accepted and followed the authority of certain decisions dependent upon the case of *West* v. *Shuttleworth* (1), to which

(1) 2 My. & K. 684.

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I will make more particular reference hereafter. The bequests are open to challenge on the ground: first, that they are for a superstitious and unlawful purpose; and secondly, so far as the gift to the Jesuit Fathers is concerned, that they are made to a monastic body. It is on the first of these grounds that the gifts have been held to fail.

It is important at the outset to disentangle the consideration of this question from that connected with the cases where money has been left to purposes which the law would declare to be illegal, but associated with what the law would regard as a charitable intent.

If a general charitable purpose be expressed, and a particular method of carrying it out directed which the law would not recognize, the failure of the particular method in which that charitable intention is to be effected does not destroy the charity, and the law substitutes by the doctrine of cy-près another method of devoting the property to charitable uses. The unlawful purpose is in such cases regarded as a means of disappointing the principal intention of the will, notwithstanding that in the result property has frequently been devoted to something which was the exact opposite of what the testator desired.

It is unnecessary to multiply references to authorities upon this point; they are to be found referred to in the case of *Moggridge* v. *Thackwell* (1), and the distinction mentioned is well illustrated in the case of *Cary* v. *Abbot*. (2)

In that case a gift had been made for the purpose of educating poor children in the Roman Catholic faith, and the next of kin sought to have the gift declared illegal and void, but the Attorney-General claimed that a general charitable intent being disclosed, the residue ought to be applied to such purposes as the Crown should please to direct. The Master of the Rolls said that: "To entitle the heir or next of kin it is requisite, not only, that the devise is to a superstitious use, but to such as is made void by statute. There is no statute making superstitious uses void generally. The statute of Edward VI. relates only to superstitious uses of a particular

(1) 7 Ves. 36. (2) 7 Ves. 490, 494.

description, then existing," and holding that the use was clearly charitable, though vitiated by the provisions that the poor children were to be educated in the Roman Catholic religion, he directed that the property should go to such use as the King should direct.

In the present case no general charitable intention is disclosed, the gift is either void or it passes to the persons and for the purposes defined. There is, therefore, no doctrine of equity affecting this gift: if void, it must be so by common law or statute. Now the principles of the common law do not change, though their application is capable of indefinite variation with the changing habits and customs of mankind. If void by the common law, therefore, it must always have been so. It cannot, however, be successfully contended that a gift to provide masses for the souls of the dead was at all times contrary to the common law. Until the reign of Edw. 6, masses for the souls of the dead were a recognized method of intercession for the departed, and there still remain scattered over the country chantries and chapels which were built and endowed for this very purpose. The common law of Ireland does not differ from the common law of England, and Palles C.B., in a judgment in a case of *O'Hanlon* v. *Logue* (1), showed with great distinctness that in Ireland such a gift is good. I do not think that the common law upon this point needs any further investigation. It therefore becomes necessary to examine what statute law affects the question, and in this respect only one statute is relied upon, that of 1 Edw. 6, c. 14. It is one of those statutes that cumber the Statute Book long after their purpose has been fulfilled, and the reason why it remains unrepealed is probably because it is completely obsolete. It was prefaced by a preamble which runs in these words: "Considering that a great part of superstition and errors in Christian religion has been brought into the minds and estimations of men, by reason of the ignorance of their very true and perfect salvation through the death of Jesus Christ, and by devising and phantasing vain opinions of phurgatory and masses

(1) [1906] 1 I. R. 247.

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satisfactory, to be done for them which be departed; the which doctrine and vain opinion, by nothing more is maintained and upholden, than by the abuse of trentals, chantries, and other provisions made for the continuance of the said blindness and ignorance."

It then proceeded to enact that chantries and lands for the maintenance of any anniversary or obit or other like thing intent or purpose or of any light or lamp in any church or chapel which had been kept or maintained within five years then next preceding should be forfeited to the Crown. It also provided by s. 38 that it should not be lawful to any person by reason of any remainder, use or condition, to claim any lands for the non-doing or non-finding of any obit, anniversary, light or lamp, from thenceforth to be founded or done.

The only part of the statute dealing with personal property is s. 7, which avoids certain gifts made within the said period of five years. These are the material parts of the statute, and from them it is perfectly plain that there was no general declaration avoiding the gifts then existing or thereafter to be made in support of masses for departed souls, but that in the case, and only in the case, of then existing trusts of lands and in certain limited cases money given for such purposes operative within five years before the passing of the Act, the King should be at liberty to enter and enjoy the same, and that for the future if any lands were given for similar purposes the persons in remainder should not be entitled to enter if the conditions were not performed. This last provision is of consequence, for if the statute had intended that all gifts for such uses were to be declared superstitious and bad, it would not have been possible to make express provisions merely preventing re-entry by the remaindermen in cases where such gifts were subsequently established.

Shortly after the passage of this Act the Act of Uniformity 2 & 3 Edw. 6, c. 1, established the "Book of Common Prayer" and imposed penalties upon any people who should use any other rite, ceremony, form or manner of masses openly or privily and, as has been pointed out, the Book of Common Prayer so established contained as part of the Communion

Service a solemn and appealing supplication for the souls of the dead. The form of Common Prayer was altered in 1552, and these services were omitted. In 1581 by 23 Eliz. c. 1, s. 4, which was directed against the Roman form of worship, penalties of fine and imprisonment were imposed both upon any person who celebrated and any who attended the service of the mass according to the Roman ritual.

The next step in the history is the case of *Adams and Lambert's Case.* (1) It was a decision upon the statute of Edward VI. The only point that then arose for determination was as to whether certain estates for life and intail were within the statute, and it was decided that they were; so far, therefore, as the decision is concerned it does not affect the question. It is, however, true that in the long and tangled report of this authority there are to be found scattered statements of far wider significance. For example at p. 113a, where it is said that the equity of the said Act "intended to extirpate all praying for souls"; but whether this was part of the judgment or part of the comments upon it is not plain; in any case I find it difficult to understand what is meant by the equity of any Act, nor, whatever is the meaning of the phrase, how the equity is to be ascertained apart from plain language and reasonable inference. The purpose of the Act was limited and there is no means by which it can be extended.

In this connection a statement made in the case of *Phillpotts* v. *Boyd* (2) as to the effect of 3 & 4 Edw. 6, c. 10, intituled "An Act for the abolishing and putting away divers books and images," is peculiarly appropriate. This statute provided that any person who then had or thereafter should have in his custody images taken out of any church or chapel or yet standing in any church or chapel should destroy them, but it was held that this did not render images on a reredos illegal, and Lord Hatherley says that "the efficacy of the Act of Edward was spent upon the definite purpose to which it was directed, and that the Legislature did not thereby make, or intend to make, provision in respect of the subsequent use or abuse of any other images."

(1) 4 Rep. 104*b*. (2) (1875) L. R. 6 P. C. 435, 462.

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Following in point of date are cases such as *Cary* v. *Abbot* (1), where the illegality of gifts in support of Roman Catholic teaching is discussed and applied. But the illegality is nowhere stated to be due to the statute of Edward VI., and is more probaby referable to the statute of 23 Eliz.

In the reported cases these gifts are associated with charitable purposes and they were not declared void. But had a gift been made in the terms of the present will, it would, owing to this illegality, have been bad. This is indeed stated in exact language by Lord Mansfield in his speech in the case of *Harrison* v. *Evans* (2) in 1767.

The question that there arose for decision was remote from that in the present case. A Protestant Nonconformist was chosen sheriff of London, and he refused to serve upon the ground that he was disqualified since he had not, in accordance with the provisions of the Corporation Act, qualified himself by taking the sacrament according to the usage of the Church of England within a year before his election. He refused to serve, and proceedings were taken against him to recover fines in accordance with the bye-laws of the City. It was held that the proceedings would not lie. Lord Mansfield's speech is certainly worthy of a more important place in the law reports than that hitherto assigned. So far as I can ascertain it is fully reported only in Furneaux's Letters to Blackstone and Cobbett's Parliamentary History (vol. xvi.). In the former it is to be found in the second edition published in 1771 at p. 249, and in the latter in columns 313–327. Its importance lies in its strong declaration of the liberty accorded to every man for freedom of religious opinion in this country, except so far as such right has from time to time been limited and invaded by Acts of Parliament. The Toleration Act had then been passed, and in dealing with its effect upon Dissenters, Lord Mansfield said: "Dissenters, within the description of the Toleration Act, are restored to a legal consideration and capacity; and one hundred conse-

(1) 7 Ves. 490.

(2) Furneaux's Letters to Blackstone, 2nd ed. (Appendix), p. 249; Parliamentary History, vol. xvi., pp. 313–327.

quences will from thence follow, which are not mentioned in the Act. For instance, previous to the Toleration Act, it was unlawful to devise any legacy for the support of dissenting congregations or for the benefit of dissenting ministers; for the law knew no such assemblies, and no such persons; and such a devise was absolutely void, being left to what the law called superstitious purposes. But will it be said in any Court in England, that such a devise is not a good and valid one now? And yet there is nothing said of this in the Toleration Act."

The question asked by Lord Mansfield to which he thought there was only one possible reply is the question your Lordships are called upon to answer in the present case.

The statement has no special application to Nonconformity, it applies with equal force to a gift for Roman Catholics when once the disabilities imposed upon them have been removed as by the Toleration Act they were removed from Dissenters.

Now Roman Catholics were not within the privilege of the Toleration Act, but by 31 Geo. 3, c. 32, the effect of the statute of Elizabeth was modified, by the Catholic Relief Act, 10 Geo. 4, c. 7, civil disabilities were removed, by 2 & 3 Will. 4, c. 115, after reciting the Toleration Act 1 W. & M. c. 18, it was provided that Roman Catholics in respect to schools, places for religious worship, education and charitable purposes and property held therewith and the persons employed in and about the same should in respect thereof be subject to the same laws as the Protestant Dissenters, and by 7 & 8 Vict. c. 102, the penal statute of Elizabeth was repealed, and there remained no illegality in the Roman Catholic faith.

The next and by far the most important authority in this case is *West* v. *Shuttleworth*. (1) It was decided in 1835. The gift under consideration provided that whatever was left to priests or chapels "I desire the benefit of their prayers and masses," and the gift was held to be void by Lord Cottenham, who was then Sir C. Pepys M.R. He was under no misapprehension as to the enactment of 1 Edw. 6,

(1) 2 My. & K. 684.

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but he said that by the preamble it was generally regarded that all such uses were superstitious and were consequently void, and in support of this he quoted the authority of Duke's "Charitable Uses," and uses words which suggest reference to *Adams and Lambert's Case.* (1) It is difficult to understand how these authorities supported the conclusion. The cases quoted in Duke's Charitable Uses are all of them cases relating to the special application of the section in 1 Edw. 6, which forfeited then existing gifts in favour of the Crown. They are of no assistance for the purpose of showing that it was intended by that statute to declare all such uses superstitious and void, nor, as already shown, does the case of *Adams* v. *Lambert* (1) carry the matter any further.

In *Attorney-General* v. *Fishmongers' Co.* (2) Lord Cottenham again took the same view of the Statute of Chantries, but added nothing to the reasons already given.

In *Heath* v. *Chapman* (3) the question came before Kindersley V.-C. He acted on the assumption that before 2 & 3 Will. 4 it was clearly admitted to be the law, that a gift of money for the welfare of a testator's soul was superstitious and void, and he says that this was due—not to the law effected by the statute of Edward VI., but because the law assumed that the gifts are void and that it stamps such trusts with illegality, and he holds that the statute of William IV. did not alter the law in this respect.

I find it difficult to understand why, if the statute of Edward VI. assumed all the gifts to be void, there should have been a limited provision covering those made within a limited time and forfeiting those only in favour of the Crown. And if it be true that the law subsequently assumed the gifts to be bad, it is explained upon the grounds already referred to that the worship had become illegal by statute.

The learned Vice-Chancellor had not before him the statement I have quoted from Lord Mansfield, which would, I think, have provided an answer to his conclusions as to the limited operation of the statute of William IV.

(1) 4 Rep. 104*b*. (2) 5 My. & Cr. 11.
(3) 2 Drew. 417.

In *In re Michel's Trust* (1), a case which related to the Jewish religion, Lord Romilly expressed his doubts as to the validity of *West* v. *Shuttleworth* (2) and *Heath* v. *Chapman* (3) in these words: "So far as relates to their places for religious worships and the property held therewith, Roman Catholics and Jews are now placed in the same position as Protestant Dissenters; and if it be part of the forms of their religion, that prayers should be said for the benefit of the souls of deceased persons, it would be difficult to say that, as a religious ceremony practised by a dissenting class of religionists, it could be deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in question, which practically have authorized them."

But he refrained from expressing any definite opinion as the case did not arise. In the case of *In re Blundell's Trusts* (4) the same learned judge reiterates his opinion: "I think the decided cases too strong, and that the House of Lords alone can alter the settled law. It is clear that I must act on *West* v. *Shuttleworth* (2), which I cannot overrule."

But in *In re Fleetwood* (5) as late as 1880, Hall V.-C., following *West* v. *Shuttleworth* (2), expressed his judgment in these words: "As regards the intended gift of 10*l.* for masses it seems to be void on the authority of *West* v. *Shuttleworth* (2)" and the subsequent cases to which he refers. Language of strange and uncertain import if the learned judge was administering a well-recognized and well-established principle of law.

Finally, in *Yeap Cheah Neo* v. *Ong Cheng Neo* (6) and in *Bowman v. Secular Society* (7), *West* v. *Shuttleworth* (2) is referred to by way of illustration without any expression of doubt as to the soundness of the decision, which indeed was in neither of the cases brought up for review.

There remains only the consideration of the effect of the statute of 23 & 24 Vict. c. 134. This statute clearly proceeds upon the hypothesis that there are purposes connected with

(1 28 Beav. 39, 42.
(2) 2 My. & K. 684.
(3) 2 Drew. 417.
(4) 30 Beav. 360, 362.
(5) 15 Ch. D. 609.
(6) (1875) L. R. 6 P. C. 381.
(7) [1917] A. C. 437.

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the Roman Catholic faith which may be treated as superstitious, and, at the same time, it may well be that the decision in the case of *West* v. *Shuttleworth* (1) was regarded as an illustration of such uses. It was intended as an enabling statute; its purpose was to prevent the destruction of an entire gift if, associated with gifts that were charitable, were others that would be held to be void. This statute was passed some twenty years after the decision in question; but it appears to me that its interpretation would be the same had it been passed immediately after the decision. In such a case it would be impossible to rely on the antiquity of the authority for its support; and, to my mind, it would have been equally impossible to prevent your Lordships' House from declaring it unsound had the matter then arisen. The fact that the statute was passed twenty years afterwards cannot, it seems to me, affect its construction, and it would indeed have been an unfortunate result, if, after other objections to this gift were shown to be untenable, an Act of Parliament passed with an obviously remedial purpose were found to have effected the exact opposite of its real intent.

I am of opinion that *West* v. *Shuttleworth* (1) was wrongly decided. A preamble to a statute may be of great service in determining the nature of doubtful and ambiguous language in its clauses, but it is impossible to legislate by a preamble, and the facts to which I have referred are to my mind clear for the purpose of showing that the statute did not, and did not intend to, have any such wide and general application. It remains only to be considered whether in these circumstances your Lordships ought to act on the view that *West* v. *Shuttleworth* (1) was erroneous. I see no reason why, if that opinion be clearly and positively held, hesitation should be felt in giving it effect. There could have been no principles known to Lord Cottenham that are not equally open to your Lordships. Had his decision depended upon the doubtful words of an ambiguous statute more difficulty might have arisen, but indeed it does not. Until that decision, and apart from certain

(1) 2 My. & K. 684.

dicta in *Adams and Lambert's Case* (1) there is nothing in the whole course of authority to which the error can be traced, nor can it be said that to alter this decision now would affect the title of existing estates. Obedience to the authority would have led to no other result than that such gifts would have been excluded from testator's wills, and that in consequence valid dispositions may have been made in favour of beneficiaries which would not have been effected had the law been accurately explained. In other words, it is the Roman Catholic religion which may have suffered by the effect of the authority, and I see no reason why what I regard as a misstatement of the law should be perpetuated in violence to the convictions of those who accept the teachings of the Roman Church.

In this respect I have the great misfortune to differ from one of your Lordships who has come to the contrary conclusion, and I have anxiously examined the authorities on which he relies—authorities some of which are binding upon this House—for the purpose of seeing that my opinion does not overstep the limits which those authorities have laid down. They are numerous, but the ones that I have selected enunciate the doctrine in sufficiently clear and unmistakable terms.

In the case of *Rex* v. *Inhabitants of Sedgley* (2), Lord Tenterden said with regard to a construction of a doubtful rating statute: "The rule of construction has been established and acted upon for a long time, and ought to be adhered to, unless we could say positively that it is wrong, and productive of inconvenience."

In *Nicol* v. *Paul* (3), in considering certain old decrees of valuation, Lord Westbury said: "My Lords, the suit, and the determination of it, are matters of very great concern generally to the heritors in Scotland. No doubt, the payments made by them and the value of their estates have for a long period of years been calculated upon the belief that these decrees of valuation would not be lightly disturbed. And I think it very desirable that the principle should be established

(1) 4 Rep. 104*b*. (2) (1831) 2 B. & Ad. 65, 73.
(3) (1867) L. R. 1 H. L. Sc. 127, 131.

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that a very liberal interpretation should be given to the language of these decrees, so as to support long usage, and the conclusions that fairly may be derived from the acquiescence of persons who had an interest in disturbing them if not well founded."

In *Morgan* v. *Crawshay* (1), a question arose as to whether iron mines were rateable for poor relief under the statute of 43 Eliz. c. 2. This statute in terms made coal mines rateable, and there had been decisions for upwards of 200 years that other mines were not; these decisions were followed, and Lord Westbury, who, it appeared, was not satisfied with their correctness, said: "We must bow to the uniform interpretation which has been put upon the statute of Elizabeth, and must not attempt to disturb the exposition which it has received."

Lord Cairns, in *Inland Revenue Commissioners* v. *Harrison* (2), says, with regard to disturbing established decisions on fiscal statutes: "I think that a course of proceeding of that kind is one which your Lordships never have adopted. It appears to me that it would be a most dangerous course for this House to adopt; and if it could be more dangerous in one case than in another, it would be so in a case in which your Lordships are dealing with one of the fiscal Acts of the country, as to which the object must be, above that of all other Acts, to maintain them and to expound them in a manner which will be consistent, and which will enable the subjects of this country to know what exactly is the amount of charge and burden which they are to sustain. I think that with regard to statutes of that kind, above all others, it is desirable, not so much that the principle of the decision should be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger or vacillation or uncertainty."

Sir George Jessel in the Court of Appeal in *Ex parte Willey* (3), in construing a Bankruptcy Act, said: "Where a series of

(1) L. R. 5 H. L. 304, 319. (2) (1874) L. R. 7 H. L. 1, 8.
(3) 23 Ch. D. 118, 127–8.

decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs."

Lord Herschell in his speech in *London County Council* v. *Churchwardens, etc., of Erith* (1), after stating that he could not regard as satisfactory the grounds upon which the Court of Queen's Bench had rested the non-rateability of certain sewers, "and that the law on the subject could not be said to be upon a sound and consistent basis" went on to say: "My Lords, I entirely concur with the learned judge in deeming it inexpedient to interfere in such a matter as this with a long course of practice supported by decisions which are not of very recent date. Therefore, even if it be not possible to rest upon grounds altogether satisfactory the exemption of these sewers, yet the case being, as I have said, a very particular one, I could not advise your Lordships to depart from a practice which has prevailed for a very long period, and which has been sanctioned by judicial authority."

In *Tancred, Arrol & Co.* v. *Steel Co. of Scotland* (2) a question arose as to the effect of an arbitration clause agreeing to refer disputes to an unnamed arbitrator designated only by his filling a particular office. By the law of Scotland such agreements are inoperative, and Lord Herschell, in support of the view that such an agreement did not oust the jurisdiction of the Courts, said: "I think that that doctrine having been laid down so long ago, whether it rests upon any sound basis or not, it would be most improper to depart from it now, because one would be really altering the contract between the parties; for we have a right to suppose that they have entered into it upon the basis of that which for nearly a century has been understood to be the law."

In *Associated Newspapers* v. *London Corporation* (3),

(1) [1893] A. C. 562, 593, 599. (2) 15 App. Cas. 125, 141.
(3) [1916] 2 A. C. 429.

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which raised a question as to liability to rates, the same sentence was again enunciated.

From these authorities I collect the following principles as applicable to such a question.

Firstly, the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless your Lordships could say positively that it was wrong and productive of inconvenience;

Secondly, that decisions upon which title to property depends, or which by establishing principles of construction or otherwise form the basis of contracts, ought to receive the same protection;

Thirdly, decisions that affect the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed, or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected, ought in the same way to continue.

I cannot find, however, that they compel acceptance as accurate of a doctrine plainly outside a statute and outside the common law, when no title and no contract will be shaken, no person can complain, and no general course of dealing be altered by the remedy of a mistake. For over eighty years Roman Catholics have been unlawfully restricted in the disposal of their property; that seems to me no reason why the restrictions should continue to be imposed.

The final question is as to whether the gift to the Jesuit Fathers in Farm Street is bad on the ground that it is given to a monastic body. If it became necessary to consider what the constitution of this body was, and whether in fact it is a monastic body, I should require further evidence than that furnished by the affidavit in this matter; but in truth I regard this as unnecessary. The Jesuit Fathers at Farm Street are not a corporation, and the gift to them cannot be regarded as a gift to a corporate body. It is in fact a gift to a group of men, members of a particular community resident at a named place, but the gift is to them individually. See *Cocks* v. *Manners* (1); *In re Smith*. (2) If there were imposed upon them by the terms

(1) (1871) L. R. 12 Eq. 574. (2) [1914] 1 Ch. 937.

of the will the obligation of holding the gift so made for the purpose of a monastic order, the gift would be bad, but no such trust exists. The trust that is imposed upon them is a trust for a purpose which I regard as lawful, which is certainly not the peculiar and exclusive duty of any monastic order, but a trust which they can perform not as members of any body, but by virtue of their ecclesiastical office in the Roman Catholic community. It is in that capacity and for that purpose that the gift was made.

All the objections to this gift, therefore, fail, and, in my opinion, this appeal should be allowed.

LORD ATKINSON. My Lords, I concur. The facts have already been fully stated by my noble and learned friend the Lord Chancellor, and I shall only restate such of them as are necessary to make what I am about to say intelligible.

The testator, a Roman Catholic, upon whose will the only question ripe for decision in this case arises, died on December 29, 1916, having by that will, dated November 29 previous, bequeathed to certain persons or bodies therein named certain sums of money admittedly for the purpose of having masses celebrated for the repose of his, the testator's, soul. He was not entitled to any real estate. Eve J. felt himself bound by the authorities to hold that these bequests were void. And the Court of Appeal upheld his decision on the ground that the law on the subject was too well settled to be shaken or disturbed by that Court, having regard to the course of the decisions since the passing of the statute 1 Edw. 6, c. 14, six of which decisions they named. None of these cases nor any others raising the same point were decided in your Lordships' House. The question of the validity of bequests such as these now comes, therefore, for the first time before this House for decision. We are consequently unfettered by any authority which the House is bound to accept and act upon.

The parties on both sides admitted that the Sacrament of the Mass was the most sacred, solemn and vital of their religious ceremonies, that attendance at its celebration is

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compulsory, that in it a prayer is offered up to the Deity to accept the Immaculate Host, which the officiating priest offers up, not only for himself and all present, but also for all faithful Christians, living or dead, that it may be profitable, not only for his own, but for their, salvation unto eternal life; and another prayer that those who have gone before those present with the sign of faith may sleep in the sleep of peace. The parties upon both sides have accepted as accurate the description given in the supplemental statement made by the defendant in the case of the *Attorney-General* v. *Delaney* (1), as to the precise nature of the mass, and of gifts made for masses for the repose of the donor's soul.

The statute 1 Edw. 6, c. 14, upon which the authorities referred to by the Court of Appeal appear to be based, is entitled, "An Act whereby Chantries, Colleges, Free Chapels, and the possessions of the same may be given to the King." This, and this only, was, apparently, the aim of the statute. Its provision cannot be examined too closely in detail. It begins with a very pronounced and, what one would, I think, in the present day, at least, consider a very bigoted preamble, in which are set forth certain evils it was desirable to correct and remedy. The true function of a preamble to an Act of Parliament is, possibly, better described by Tindal C.J. in the case of the *Sussex Peerage Case* (2), cited with approval by Lord Halsbury in *Commissioners of Income Tax* v. *Pemsel* (3), than elsewhere. His statement of the rule of law has already been quoted.

Judging from the report of *Adams and Lambert's Case* (4), the first of the six cases mentioned by the Court of Appeal, and the authority upon which the other cases mentioned purport to be based, the preamble to this statute of Edward VI. seems to have served a much more ambitious purpose. It was treated, it appears to me, as if it extended beyond the evils named and the remedies prescribed in clear and precise language in the enacting portions of the statute, and dealt, with legislative authority and force, with other matters,

(1) I. R. 10 C. L. 104.
(2) 11 Cl. & F. 143.
(3) [1891] A. C. 531, 543.
(4) 4 Rep. 104*b*.

making them unlawful on the ground that they, though untouched by the sections of the Act, conduced to the evils against which the statute was directed.

The more important portion of this preamble has been already quoted. I only quote in addition the concluding portion of it: "And further considering and understanding, that the Alteration, Change and Amendment of the same, and converting to good and godly uses, as in erecting of Grammar Schools to the Education of Youth in Virtue and Godliness, the further augmenting of the Universities, and better provision for the poor and needy, cannot in this present Parliament be provided and conveniently done, nor cannot, ner ought to any other manner person be committed, than to the King's Highness, whose Majesty with and by the advice of His Highness' most prudent Council, can and will most wisely and beneficially, both for the honour of God and the weal of His Majesty's realm, order, alter, convert and dispose of the same."

This might possibly be a not unsuitable preamble for a statute which, looking both to the past and to the future, made disbelief in the efficacy of the Atonement, or belief in the doctrine of purgatory, or the efficacy of masses to secure for departed souls release from purgatory, or the celebration of, or attendance at the saying of masses, illegal or possibly criminal acts, but the Statute of Edward VI. does none of these things. In one section, and one section alone, does it deal with the future. Every other section deals with the past. It did not make belief in any doctrine or the performance of any religious ceremony an offence. It did not, it appears to me, make any gift for the celebration of masses, or any ceremony for the repose of the souls of deceased persons illegal or void. It recognized them as valid, but enabled the King, in the specific instances mentioned, but none others, to capture the subject-matter of each gift and employ it for purposes other than, and different from those for which it was originally given. And as to the future it, by s. 38, enabled those to whom these gifts were made to omit, with impunity, to fulfil the duties for the discharge of which they were given.

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Following the preamble the provisions of statute 27 Hen. VIII. dealing with the dissolution of chantries, are recited, and then, developing the policy of that measure, it is enacted that all manner of colleges free chapels and chantries having been in esse within five years before the opening of the then present Parliament other than those in the actual possession of Henry VIII. and those excepted by the aforesaid Act of his reign, or altered by the commissioners in manner prescribed, and all the manors, lands and tenements, rents, tithes, pensions, portions or other hereditaments belonging to them or any of them. "And also all Manors, Lands, rents and other hereditaments and things above-mentioned, by any manner of assurance, conveyance, will, devise, or otherwise had, made, suffered, knowledged or declared, given, assigned, limited or appointed, to the finding of any Priest, to have continuance for ever, and wherewith or whereby any Priest was sustained, maintained or found within five years next before the first day of this present Parliament (which were not in the actual and real possession of the said late King, nor in the actual or real possession of Our Sovereign Lord the King that now is). And also all annual rents, profits and emoluments, at any time within five years next before the beginning of this present Parliament, employed, paid or bestowed, toward or for the maintenance, supportation or finding of any stipendiary Priest, intended by any Act or writing to have continuance for ever, shall by the authority of this present Parliament, immediately after the feast of Easter next coming, be adjudged and deemed, and also be in the very actual and real possession and seisin of the King our Sovereign Lord, and his heirs and successors for ever, without any office or other inquisition thereof to be had or found, and in as large and ample manner and form as the Priests, Wardens, Masters, Ministers, Governors, Rulers, or other incumbents of them or any of them, at any time within five years next before the beginning of this present Parliament, had, occupied or enjoyed . . . . the same." It will be observed that the provision of this period of five years limits every branch of this enactment.

The third section of the statute deals with terms of years,

created at any time before the passing of the Act, for the finding or maintenance of a priest or priests, but, in pursuance of the policy of the Act, required that the term should be enjoyed by the aforesaid priest or priests within the aforesaid period of five years. The following section secures to those entitled to the reversion a right of re-entry at the expiration of the term. The fifth and sixth sections deal with anniversaries, obits, light and lamps, in churches and chapels, and provide that there shall be forfeited to the King any lands, rents or other hereditaments at any time theretofore given or appointed, etc., to be employed wholly for the finding or maintenance of any anniversary or obit *or other like thing intent or purpose* for ever, or for the finding or maintenance of any light or lamp in any church or chapel to have continuance for ever. The sixth section deals with the cases where only portions of the lands or rents are given for the above-mentioned purposes. But here again comes, as I construe the section, the provision that the finding, keeping and maintenance mentioned must have taken place or be enjoyed within the aforesaid period of five years. There is not in the foregoing sections, nor in any part of the statute, any suggestion or trace of a provision that where only part of the lands or the rents thereof are given for any of the purposes mentioned, the grant of the remainder of the lands or rents to some legitimate purpose, such as a charity, is vitiated or contaminated by its connection with the first grant. An obit, we were informed by Mr. Russell, was a requiem service which may or may not include the solemnisation of the mass. The italics are mine, I use them to draw attention to words which in some of the cases have been construed as not confined, as in my opinion they should be, to things of similar intent and purpose to anniversaries and obits, and subject to the like conditions but extending much beyond these.

Sect. 7 deals with sums of money, profits, emoluments or commodities theretofore given within the said five years by the corporations or guilds named, for purposes similar to those described in two next preceding sections. Sect. 38, the only section dealing with the future, provides that it shall not be

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lawful for any person or body politic or corporate by reason of any remainder use or condition to enter into claim or challenge any lands, tenements or hereditaments for the non-doing non-naming or non-finding of any such priest or priests as aforesaid, or an obit, anniversary, light or lamp henceforth to be provided or done anything contained therein to the contrary notwithstanding. This section, so far as the remaindermen and reversioners are concerned, secures to the grantees the continued enjoyment of property given to them for certain purposes though they may never so use it. Probably it may have been designed to discourage such gifts, but on the face of it, and of the fact that the period of five years is made applicable to all gifts made in the past, I am, with the most infinite respect for the distinguished judges with whose decisions I shall presently deal, utterly unable to discover on what just legitimate or rational principle of construction they have found in this statute a provision, expressly or impliedly, invalidating, or making void, a gift, made hundreds of years after the statute was passed, providing for the celebration of masses for the repose of the soul of the donor. In the first place it can be clearly shown that this preamble is not declaratory of, or based upon the then existing common law of England.

First, from the very nature of the duties which those holding lands by the tenure of frankalmoigne were bound to perform. In Co. Litt., s. 135, it is stated that these duties were "of right before God to make orisons, prayers, masses, and other divine services, for the soul of their grantor or feoffor, and for the soules of their heires which are dead, and for the prosperity and good life and good health of their heires which are alive. And therefore they shall do no fealty to their lord; because that this divine service is better for them before God, than any doing of fealty; and also because that these words (frankalmoigne) exclude the lord to have any earthly or temporal service, but to have onely divine and spirituall service to be done for him, etc." If this divine service be not performed complaint is to be made to the ordinary or visitor.

Littleton proceeds in s. 137, Co. Litt. 96*b*, to distinguish

this tenure from the tenure by divine service, i.e., where the masses are to be sung or said at stated periods. According to Bracton, the common law regarded these gifts as in a primary sense made to God and the Church, and in a secondary sense made to the canons or monks or other persons, and for this reason he says the gifts were held and considered to be pious. See History of English Law, Pollock and Maitland, 1st ed., vol. i., p. 222 ; 2nd ed. p. 243.

In *O'Hanlon* v. *Logue* (1) Palles C.B., in the course of an elaborate judgment on these points, says : " All this shows the true reason why the common law held the gifts pious. It was because they were gifts to God : gifts which provided for the worship of God. Even had the common law acknowledged more religions than one, it would have held pious any gift making provision for the worship of God, irrespective of the particular acknowledged religion according to which the worship was to be offered, provided only such religion were recognised as lawful."

Well, there is a second fact which leads to the same conclusion. Henry VIII. died in January, 1574, the year in which this statute of Edward VI. was passed. It is, as I understand, an undoubted historical fact that Henry VIII. got the title of Fidei Defensor from the Pope for his writings against Luther, and that he never had any quarrel with the Pope on points of doctrine. By his will dated in December, 1573, of which there is no valid ground for doubting the authenticity, he directed that an honourable tomb for his body should be made in the choir of the college of Windsor, and that there should be provided and set up a convenient altar honorably prepared and apparelled with all manner of things for daily masses there to be said perpetually while the world should endure. And that his executors should, with all convenient speed, cause his body to be removed to the college at Windsor and the service of Placebo Dirige with a sermon and mass on the morrow be done and solemnly kept. He further directed his executors to give in as short a space as possible after his death 1,000 marks to the most needy people (other than regular

(1) [1906] 1 I. R. 247, 269, 270.

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beggars) to pray heartily unto God for the remission of his sins and the health of his soul. It is impossible, I think, to believe that the King would have made a will to this effect, if either the saying of masses for the repose of the soul of the dead, or the praying for the soul of the dead, was at common law illegal as a superstitious use or practice.

There is a third and most significant fact, namely, this: that the authorities cited in argument conclusively establish that in those countries upon which England has conferred the boon of her common law, but to which the statute 1 Edw. 6, c. 14, does not extend, gifts for masses for the repose of the soul of the donor, or of any other person are held not to be gifts for superstitious uses or void at law. Those authorities are, in the case of Ireland, *Commissioners of Charitable Donations and Bequests* v. *Walsh* (1), decided by the Lord Chancellor, Lord Manners, in 1823; *Read* v. *Hodgens* (2), decided by Blackburne M.R. in 1844, and several other cases, the two most recent of which are *Attorney-General* v. *Hall* (3) and *O'Hanlon* v. *Logue* (4); in the case of Canada, *Elmsley* v. *Madden* (5); in the case of New Zealand, *Carrigan* v. *Redwood* (6); in the case of Australia, *Nelan* v. *Downes* (7); and in the case of the United States of America, *Holland* v. *Alcock* (8); and *In re Schouler* (9); while the 31 Edw. 3, c. 11, expressly directed any administrator to expend money for the soul of the deceased. The case of *Adams and Lambert's Case* is reported in 4 Rep. 104*b* at extraordinary length. Even in the English Reports it covers sixteen closely printed pages. It is not easy to distinguish the observations of the judges who decided the case from the opinions and reflections of the reporter; and any person who reads the report will be inclined to concur with Lord Ellesmere who said the one who does so will "run into a wood or thicket, out of which he shall not easily wind himself; he" (i.e., the reporter) "hath so darkened the case by many intricate differences, whereof

(1) (1823) 7 Ir. Eq. Rep. 34, n.
(2) 7 Ir. Eq. Rep. 17.
(3) [1897] 2 I. R. 426.
(4) [1906] 1 I.R. 247, 269, 270.
(5) 18 Grant, 386.
(6) 30 N. Z. L. R. 244.
(7) 23 C. L. R. 546.
(8) 108 N. Y. 312.
(9) 134 Mass. 426.

the Court that argued the same, did never dream." The action was one of ejectment. The jury found a special verdict that John Barton, who was seized in feu of the lands sought to be recovered, had devised the same to his younger brothers for life with remainder to his sister in tail on condition that they should appoint a priest and have celebrated for ever obits. No devise was made of the remainder in fee. The point of controversy raised in the case was this : that the letter of the Statute of Edward VI. applied only to gifts for the finding of a priest to have continuance for ever or for a term of years, and, therefore, that the cases of devises of estates for life or in tail for these purposes were casus omissi from the statute. The report states it was decided that estates for life and in tail were included in equity within the statute. The report then goes on, in a passage which appears to be a suggestion of the reporter rather than a statement of the Court, to give the reason for the decision in these words (p. 106*b*.) : "for the intent and meaning of the Act, as appears by the preamble, was to extirpate out of men's minds these superstitious errors, and to take them utterly away, in what manner, or for what time, they were given, and not to take them away only which were appointed to have continuance for ever, and leave those to have essence which were determinable or limited for a time." Then follows a statement which is entirely erroneous, indeed, little more than a travesty of enacting portions of the statute, "and forasmuch as the statute by express words abrogates and takes away all such superstitious uses which were to have continuance for ever, by equity and good construction it extends to every less time whatsoever." And "it was said, that the statutes say 'by any manner of assurance, conveyance, etc., for ever,' and by common possibility an estate tail may continue for ever. Also in this case at Bar the intent of the devisor was (as appears by his will), that the priest should be found for ever, for he appoints also his right heirs to find him : and if such construction should not be made, the mischief intended to be remedied by the Act would remain, against the intent and meaning of the Act." In the clauses of obits the words are, "to have

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continuance for ever." If in this case the devise plainly satisfied all the requirements of the statute save that the estate given was for life with remainder in tail and not in fee, the observations quoted seem far-fetched enough ; but the puzzle is to see how, even by treating the preamble as a positive enacting clause, it could be held that all gifts for masses for the repose of the soul of the donor made in the future should be treated as void.

Your Lordships have not been referred to any authority to show that such an effect as this can be given to the preamble of a statute. I myself can find none. I do not think the preamble to this statute can be regarded as an enacting provision, and in my opinion any decision, solely or mainly based upon the assumption that it can, must be erroneous.

In Bacon's Abridgment, 7th ed., vol. ii., p. 37, title " Charitable Uses and Mortmain (D) ", a superstitious use is defined to be " where lands, tenements, rents, goods or chattels are given, secured, or appointed, for and towards the maintenance of a Priest or Chaplain to say mass ; for the maintenance of a Priest, or other man, to pray for the soul of any dead man, in such a church, or elsewhere ; . . . . these, and suchlike uses, are declared to be superstitious, to which the King . . . . as head of the Church and State, and entrusted by the Common Law, to see that nothing is done in maintenance or propagation of a false religion, is entitled. . . . . "

It would, in my view, be as rational to hold that the Roman Catholic religion was, on the morrow of the death of Henry VIII., looked upon by the State as a " false religion " as it would be to hold that it was similarly regarded when the 27th Hen. 8 was passed in the year 1535, or the 37th Hen. 8, c. 4, was passed in the year 1554. The young sovereign has left in the legislation of the very next year of his reign statutory evidence of the light in which he regarded that religion.

The 2 & 3 Edw. 6, c. 1, is intituled an Act for the Uniformity of Service and Administration of the Sacraments throughout the Realm. It commences with a preamble reciting that there has been for a long time in the realm divers forms of Common Prayer commonly called the Service of the Church

as well concerning the matins, or morning prayer, and the evening song, as also concerning the Holy Communion commonly called the mass; the drawing up of the Book of Common Prayer and the administration of the sacraments and other rites and ceremonies of the church after the use of the Church of England is then recited, and it is enacted that this Book shall be used for matins, evensong, celebration of the Lord's Supper, commonly called the mass, and the administration of each of the Sacraments.

In the Communion Service so prescribed we find this prayer addressed to the Deity: "And here we give unto Thee most high praise and heartie thanks for the wonderful grace and virtue declared in all Thy saints from the beginning of the world chiefly in the glorious and most blessed Virgin Mary mother of the Son Jesus Christ. . . . . We commend unto Thy mercy, Oh Lord, all other Thy servants which are departed hence from us with the sign of the faith and now do rest in the sleep of peace. Grant unto them, we beseech Thee of Thy mercy an everlasting peace and that at the day of general resurrection we and they which be of the mistical body of Thy Son may together be set on His right."

This prayer closely resembles one of the prayers offered up by Roman Catholics in the sacrifice of the mass to-day. Three years after this date the King, by the 5 & 6 Edw. 6, c. 1, s. 5, reciting that he had caused the Book of Common Prayer to be explained and amended, directed it, so explained and perfected, to be used. The above-mentioned prayer is not to be found in this Second Prayer Book.

Twenty-nine years later, owing probably to the political events which had occurred in the interval, the condition of things was completely changed. In the year 1581 23 Eliz. c. 1 was passed. By its fourth section, the saying or singing of, or being present at the celebration of the mass was made a serious criminal offence, absolutely punishable on conviction, in the former class of cases, with a fine of 200 marks and imprisonment for one year and for such further time as the fine should remain unpaid, and in the latter class of cases, punishable by a fine of 100 marks and imprisonment for one

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year. While this statute continued in operation, as it did for two hundred and ten years, a gift to have masses said for the repose of the soul of anyone was a gift to have a crime committed, and, therefore, illegal and void, and such Roman Catholic ceremonials as involved the saying of the mass were also necessarily illegal.

The case of *Adams and Lambert's Case* (1) was decided in the year 1602, twenty-one years after this statute of Elizabeth was passed. From the mode in which the case is reported in Coke, it is not, I think, extravagant to conjecture that the reporter was not entirely insensible to the spirit which finds expression in this statute. Well, at length, after two hundred and ten years of waiting, some relief came to people of the Roman Catholic persuasion. In the year 1791, the 31 Geo. 3, c. 32, was passed. By s. 4 of that statute Roman Catholics, on taking the Oath of Allegiance prescribed, were permitted to conduct and be present at all their religious services. They were entitled to believe in the existence of purgatory as they had always done, and were also entitled to have the ordinary masses said for the repose of the souls of the dead.

But by the seventh section of this statute it was provided that nothing contained in the statute should make lawful the founding or endowing of any religious order or society of persons bound by monastic or religious vows, or the founding or endowing, or establishing of any school or academy or college of persons professing the Roman Catholic religion within the realm or the dominions thereto belonging, and further that all uses, trusts and dispositions, whether of real or personal property which immediately before June 24, 1791, were deemed to be superstitious, should continue to be so deemed and taken to be, anything in the Act to the contrary notwithstanding. In this state of the law the case of *Cary* v. *Abbot* (2) was, in 1802, decided. There a Roman Catholic testator bequeathed the residue of his property to trustees for the purpose of educating and bringing up poor children in the Roman Catholic faith, etc. The Bill in the case was filed by the next of kin of the deceased, claiming to

(1) 4 Rep. 104*b*. (2) 7 Ves. 490, 495, 497.

have the bequest declared void, not to have it forfeited to the King, which was the result at which the Act of Edward VI. aimed. The Master of the Rolls (Sir William Grant) in delivering judgment, said : " But in this case can I, founding myself upon the expression of Lord Hardwicke in *De Costa* v. *De Pas* (1), say, this is so wholly void as not to be applicable to any other purpose ? According to that statement, to entitle the heir or next of kin it is requisite, not only, that the devise is to a superstitious use, but to such as is made void by statute. . . . The statute of Edward VI. relates only to superstitious uses of a particular description, then existing." He then refers to statutes of Henry VIII. and George I., which he shows do not apply, and winds up by saying : " Here the use is clearly charitable in its nature, viz., for poor orphan children. What vitiates it is, that they are to be educated in the Roman Catholic religion. I must declare the bequest of the residue void, but that it must go to such uses as the King shall direct." Well, it would appear to me that the Master of the Rolls must have misunderstood what Lord Hardwicke laid down in *De Costa* v. *De Pas.* (1) See that noble Lord's correction of the report of the case in *Moggridge* v. *Thackwell.* (2) The important point, however, is that the Master of the Rolls clearly recognizes that the statute of Edward VI. does not, either by its preamble or enacting part, apply to all gifts to superstitious uses, but only to those with which it specifically deals.

The Master of the Rolls does not explain upon what ground he holds a gift to educate orphan children in a religion which, if they were old enough to take the Oath of Allegiance, they could profess with impunity was void. It may be that the decision was based on 23 Eliz. c. 1.

After forty-one years, further relief from their disabilities came to Roman Catholics by the passing, in the year 1832, of 2 & 3 Will. 4, c. 115.

By its first section, Roman Catholics are, as to their schools, places for Roman Catholic worship, education and charitable purposes, the property held therewith, and the persons employed

(1) Amb. 228. (2) 7 Ves. 76.

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about the same, placed in the same position as Protestant Dissenters. That necessarily means, I think, that just as Protestant Dissenters could bequeath money to build a church or chapel or to pay a minister to conduct religious worship therein according to their creed, so may Roman Catholics give or bequeath money to have a church or chapel built and a priest paid to conduct their religious services therein, including, of course, the solemn Sacrifice of the Mass, and also to teach and preach the doctrines of their creed, including the doctrine of the existence of purgatory and the effect of masses for the soul of the deceased in aiding its release from purgatory. These are the kind of things mentioned in the preamble to the Act of 1 Edw. 6, c. 14. It was admitted by both parties in this case that the mass said for the repose of the soul of a deceased donor is precisely the same mass as is said in the ordinary and regular worship; that the name of the person for whose soul the mass is said is never announced or mentioned, that it depends entirely on the intention of the officiating priest, and that the sums directed to be paid are as Dr. Delaney described them. It is admitted that in the service of the mass, as it is ordinarily celebrated, the Host is offered up to the Deity not only for the sins of the officiating priest, but also for those of the faithful living and dead, that it may be profitable for his and their salvation to eternal life; that the chalice is offered up that it may ascend with the odour of sweetness for the salvation of the congregation present and for that of the whole world, and that a further prayer is said for the congregation and all who have gone before them with the sign of faith and sleep in the sleep of peace.

My Lords, it appears to me that this legislation of 1832 is so opposed to all that had gone before that it is almost grotesque to hold that a bequest endowing a priest, in order that he should celebrate the mass in the ordinary conduct of the religious worship of his creed, is valid, and yet that a bequest to him directly to say the same mass with the same prayers for the repose of the donor's soul is a gift for a superstitious use and void. Yet something very akin to this was decided to be the law in 1835, in the case of *West* v. *Shuttleworth*. (1) There

(1) 2 My. & K. 684, 697.

a testatrix by several documents taken together bequeathed to certain chapels and to certain priests named, specified sums of money for masses for the repose of her own soul and that of her deceased husband, the residue of her estate to be appropriated by the persons named in the will in such a way as they should think best calculated to promote the knowledge of the Catholic Christian religion amongst the poor and ignorant inhabitants of Swale Dale and Wenston Dale, in the county of York. It was held by Sir C. Pepys M.R., as Lord Cottenham then was, that this latter bequest was good and valid, and the bequest for masses void. He, in delivering judgment, said: "It is truly observed by Sir William Grant in *Cary* v. *Abbot* (1), that there was no statute making superstitious uses void generally, and that the statute of Edward 6. related only to superstitious uses of a particular description then existing; and it is to be observed that that statute does not declare any such gift to be unlawful, but avoids certain superstitious gifts previously created."

All that is quite accurate and convincing, but then comes a most unsatisfactory statement of the law: "The legacies in question, therefore, are not within the terms of the statute of Edw. 6, *but that statute has been considered as establishing the illegality of certain gifts*, and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in Duke, p. 466, been decided to be within the superstitious uses intended to be suppressed by the statute. I am, therefore, of opinion that these legacies to priests and chapels are void." The italics are mine.

I have examined the cases collected in Duke at p. 466 and the following pages. They are all based upon the report in 4 Coke of the case of *Adams and Lambert*, and give little help. This distinguished judge, the Master of the Rolls, gives no indication whatever as to what it is upon which the opinion of the judges was based that the statute of Edward VI. made these gifts illegal. The next case referred to is *Attorney-General* v. *Fishmongers' Co.* (2), decided by the Master of the Rolls, Lord Langdale, in 1839. There the testator who died

(1) 7 Ves. 490. (2) (1839) 2 Beav. 151, 171; 5 My. & Cr. 11.

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in the year 1529 devised lands in the City of London to the Fishmongers' Co. to the intent that they should perform his will in manner declared. He then provided for obits and anniversaries without limiting any term within which the expenses of these should be confined, and he willed that the company should provide four honest priests studying in the universities to pray for his soul quarterly. He then directed the company to provide thirteen poor men and women to pray specially for his soul, and he further provided for a perpetual successor of such poor people who were to attend his obits and anniversaries and to be paid eightpence weekly. These devises and bequests to pray for the soul were held to be superstitious uses within the statute of Edward VI., and in giving the judgment, the Master of the Rolls said: "It seems that the case of *Adams* v. *Lambert* as reported by Coke and Moore, and several of the authorities there cited, and the case of *Pitts* v. *James* as reported by Rolle (1), and other cases stated in Duke cannot be read without coming to the conclusion, that establishments or foundations for securing prayers for the souls of the dead were deemed to be superstitious and within the statute of Edward VI.; and upon these authorities I am of opinion that the directions of the will to which I have referred are such, that the payments made in respect thereof became the property of the Crown." This case came on appeal before Lord Cottenham in January, 1841. Lord Cottenham says (2): "The fifth section of the 1 Edw. 6, c. 14, gave to the King all lands given to the founding or maintenance of any anniversary or obit, or other like thing, intent, or purpose; and, by many decisions, referred to in *Adams and Lambert* (3), it was decided that praying for souls of the dead was a like intent and purpose as an anniversary or obit, within the meaning of the Act, although not to be performed by a priest, or in any chapel." With all respect, I think it is only necessary to read the fifth section of the statute of Edward VI. to see that this was a wholly erroneous construction. He says further:

(1) p. 416. (2) 5 My. & Cr. 15.
(3) 4 Rep. 104*b*.

" And that where the gift was for the benefit of the poor, but connected with such superstitious uses as their praying for souls, the whole went to the King." Owing to the date of the death of the testator, 1529, of course neither the Master of the Rolls nor Lord Cottenham had to consider the effect of the Acts of 1832 upon the inferences drawn from the statute of Edward VI. The next case is that of *Heath* v. *Chapman* (1), decided by Kindersley V.-C., in the year 1854. In that case a Roman Catholic testator who died on April 16, 1846, by his will dated ten days previous bequeathed several annuities of different amounts in perpetuity to two churches in Venice and one in London, the first of these gifts for masses and requiems for the souls of himself and his deceased sister, the second and third for masses for souls of the poor dead and for other pious uses.

It was held, according to the headnote, that the gifts for masses, etc., for the dead were superstitious and void, that the pious uses could not, as religious uses, be separated from the others, and were, therefore, also void, and that the words " pious uses " could not be construed charitable uses. Consequently the property given to these uses went to the residuary legatees of the donor. Neither in this case nor in any reported case which I have been able to discover from the death of Henry VIII. downward have I found any critical analysis of the provisions of the 1 Edw. 6, c. 14, any clear statement of the principle upon which, or any precise indication of the enactment or enactments by which, the old pious uses of the common law had been converted into superstitious uses. The learned judges who decided these cases, able and distinguished though they were, contented themselves apparently with resting their decision on a presumption. In this respect Kindersley V.-C. was no exception to the rule, for he says in the course of his judgment (2): " Now it is quite clear that, at all events before the 2 & 3 Will. 4, it was commonly assumed to be the law, and the assumption was acted on, that a gift to a priest for masses for the repose of the testator's soul, or a gift to a priest to say masses generally, was superstitious and void. . . . .

(1) 2 Drew. 417. (2) 2 Drew 423, 424.

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That statute (1) declares, as to certain uses, not that they are void—it assumes that—but that the property given to such uses is to belong to the Crown; and the Courts of Law have subsequently put this interpretation on that statute, not that it actually declares such trusts to be void, but that it stamps on all such trusts, whether created before or subsequently to the statute, the character of illegality, on the ground of being superstitious."

With all respect I think it would be difficult to compress into such a limited space more historical and legal inaccuracies. It is, as I have shown, quite erroneous to say that before the 1 Edw. 6 gifts to have masses said either for the repose of the donor's soul or generally were deemed to be superstitious uses and void. It is equally erroneous to say that this statute assumes that all such gifts are void. The learned Vice-Chancellor seems to have ignored the existence of the five years' limit, and the provision of s. 38 as to future grants contained in this Act. And he does not give the name of a single authority establishing the propositions he lays down; *Adams and Lambert's Case* (2) does not establish them.

On p. 424 he says that all that was intended by the statute 2 & 3 Will. 4 to do was: "As to their places of worship, as to their places of education, and as to employment of persons officiating in their ceremonial . . . . to put Roman Catholics on the same footing as Protestant Dissenters. But it does not refer at all to the purposes to which property is devoted, which, if superstitious, still render the gift void. No doubt, if property is given for the use of a place of worship, that is good; but the statute leaves quite untouched the case, where property is given for superstitious uses."

But surely the statute cannot mean that Roman Catholics are placed by it in the position before the law of Protestant Dissenters merely as regards the structure of the schools and places of religious worship, and the staffs employed in each respectively. It must, I think, mean that they are placed in the same position of freedom, as were the Protestant Dissenters, to give in their schools, should they desire it, instruction in

(1) 1 Edw. 6, c. 14. (2) 4 Rep. 104*b*.

the doctrines of their religion as well as in secular subjects, likewise to conduct in their places of worship the usual religious service of their Church, to preach the doctrines of their creed, and to celebrate the most sacred and vital of the sacraments, the mass. It cannot be that this statute does not permit the saying of the mass in their places of worship. I am not quite certain what it is the Vice-Chancellor means by a superstitious use. Is the celebration of the mass in the ordinary course, according to his view, a superstitious use, or does the saying of it only become a superstitious use when some person gives money or money's worth specifically to have it said for the repose of a soul? For instance, if a devout Roman Catholic should lose his wife and on the Sunday after her burial should attend mass and hear himself prayed for and the repose of her soul prayed for also. If he likes that service he may give 20*l.* to have it repeated. That mass was not a superstitious use before he gave the 20*l.*, but does it become a superstitious use after he has given it? So that its character is changed before the law by the payment of this sum of 20*l.* I must say that this distinction, though apparently relied on by Sir J. Romilly in *In re Michel's Trust* (1), is in my view unsound and irrational.

The teaching of the doctrine of purgatory, of the propriety of attending mass, of the nature and efficacy of the sacrament may all be lawfully taught, and a fund for promoting the teaching of them will be administered by the Court, though they be at variance with the doctrines of the Established Church. Indeed, as already pointed out, a bequest to secure the teaching of the Roman Catholic religion was held in *West* v. *Shuttleworth* (2) to be good. But Sir John Romilly has some wholesome misgivings on another point.

In the above-mentioned case of *In re Michel's Trust* (1) a bequest was made by a Jew to have a particular Jewish prayer said daily. The 8 & 9 Vict. c. 59, s. 2, dealt with the Jewish religion in precisely the same way and to the same extent as the Act of 1832 had dealt with the Roman Catholic religion. The gift was held good and not superstitious,

(1) 28 Beav. 39, 42. (2) 2 My. & K. 684.

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for this strange, and it would appear to me most fanciful reason, namely, that there was nothing to show that the prayers were to be said with the notion that the soul of the testator would be thereby benefited. In giving judgment, however, the Master of the Rolls said : "The case of *Adams and Lambert* (1) was cited, but that case principally relates to what estates devoted to superstitious uses are forfeited to the Crown under the statute. There are many superstitious uses unconnected with prayers for the soul ; but in regard to *West* v. *Shuttleworth* (2) and *Heath* v. *Chapman* (3), I have always felt this difficulty :—so far as relates to their places for religious worship and the property held therewith, Roman Catholics and Jews are now placed in the same position as Protestant Dissenters ; and if it be part of the forms of their religion, that prayers should be said for the benefit of the souls of deceased persons, it would be difficult to say that, as a religious ceremony practised by a dissenting class of religionists, it could be deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in question, which practically have authorized them." I quite concur. It would be most difficult to say it, but this is precisely what the respondent in the present case asks and presses your Lordships, in effect, to say.

In the case of *In re Blundell's Trusts* (4) the same learned judge said, alluding to *In re Michel's Trust* (5) : "I expressed my difficulty, in the case referred to, as to whether gifts for religious ceremonies practised by a dissenting class of religionists might not be permitted, if not opposed to public morality ; but I think the decided cases are too strong, and that the House of Lords alone can alter the settled law."

My Lords, I am glad to think your Lordships are about to perform that worthy task.

It is but about two years since this House decided in *Bowman* v. *Secular Society* (6) that a bequest to the defendant society was valid, though one of the chief objects of the society

(1) 4 Rep. 104*b*.
(2) 2 My. & K. 684.
(3) 2 Drew. 417.
(4) 30 Beav. 360, 362.
(5) 28 Beav. 39, 42.
(6) [1917] A. C. 406.

was the promotion, in such ways as might from time to time be determined, of the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action. It is difficult if not impossible to distinguish this from Atheism.

My Lords, I think it is too late in the day to hold in this country that a religious ceremony, believed by millions of the Roman Catholics of Christendom to be a solemn and sacred sacrament, is merely a superstitious rite. I should myself be prepared, if need were, to hold that, if not *Adams and Lambert's Case* (1), certainly all the cases which have followed it and purport to be based upon it down to the year 1832 were wrongly decided. For the purpose of the present case that, I think, is scarcely necessary, because in my opinion the statute of that year changed fundamentally the entire situation, the whole outlook, and the underlying principle of the law in reference to the Roman Catholic religion.

I am clearly of opinion that all the relevant cases decided from this new point of departure to the present time were wrongly decided, and that the bequests, the subject of controversy in the present case, were not void on the sole ground that they were gifts for superstitious uses.

It has been urged, however, that though this might be the view of all your Lordships, we are, as I understand it, precluded from allowing this appeal by reason of a provision contained in 23 & 24 Vict. c. 134, s. 1. This section was passed to meet the case referred to in Coke's report of *Adams and Lambert's Case* (2), to the effect that where lands are devised, the rents and issues to be applied to a good charitable use and also to a superstitious use, nothing certain being limited to the former case, the bad use infected the good and the subject of each was forfeited to the King. The section provides that an existing or future disposition of real or personal property to a lawful charitable trust for the exclusive benefit of the Roman Catholic religion shall not be invalidated " by reason only that the same estate has been or shall be also subjected to any trust or pro-

(1) 4 Rep. 104*b*. (2) 4 Rep. 113*a*.

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vision deemed to be superstitious, or otherwise prohibited by the laws affecting persons professing the same religion."

In my opinion the words "Any trust or provision deemed to be superstitious or otherwise prohibited by the laws affecting persons professing the same religion," must mean prohibited by law because they are held to be superstitious or prohibited by law for any other reason. To give those words any other meaning it would be necessary to strike out the words "or otherwise" which would in my view be quite illegitimate; but surely these words must mean prohibited at the time the statute of 1860 was passed, by the law as truly interpreted. This is a remedial Act designed to relieve Roman Catholics from previously existing disabilities. It is not designed to protect and perpetuate the effect of erroneous decisions. And, therefore, if a trust for masses for the repose of the soul of a testator, created by his will executed in 1836, be held by any tribunal other than this House to be a superstitious trust prohibited by law within the meaning of this statute, then if that decision be reversed by this House as being based on an erroneous interpretation of the law, this statute of 1860 cannot apply to the trust at all.

Neither do I think that the principle of *Morgan* v. *Crawshay* (1) applies. The Act of 1832 has, in my view, as I have already said, entirely modified the law and created a new point of departure. Only a few cases on the question of superstitious uses have since been reported, and even if one has to start from the year 1602, there has been no such long and uniform series of clear and positive decisions extending over centuries on the same statute as there was in that case.

In the cases I have cited phrases such as "it has been assumed," "it has been understood," etc., abound, but in no case can one find a critical analysis of the provisions of the statute of Edward VI., upon which the decision purports to be based, or any clear indication of the particular section of that statute justifying the assumption so gratuitously relied upon. I think the judgment of Lord Loreburn in *West Ham Union* v. *Edmonton Union* (2) is much in point. On the whole I am

(1) L. R. 5 H. L. 304. (2) [1908] A. C. 1.

of opinion that the decision appealed from is erroneous and should be reversed, and that this appeal should be allowed.

LORD PARMOOR. My Lords, by a will dated November 29, 1916, and proved in the principal registry on January 23, 1917, Edward Egan (inter alia) bequeathed to the cathedral for masses, 200*l.*; to the Jesuit Fathers, Farm Street, 200*l.* for masses; to the Dominican Fathers, Black Abbey, Kilkenny, 100*l.* for masses; to the Franciscan Fathers, Walking Street, Kilkenny, 100*l.* for masses; and his residuary estate after all expenses, to the Jesuit Fathers, Farm Street, for masses. It has been found that the Westminster Cathedral, situated in Ashley Place, London, is the cathedral referred to in the said will, and the appellants, His Eminence Francis Cardinal Bourne, and the Rev. Terence Donnelly, have been appointed to represent respectively the interests of the cathedral and of the Jesuit Fathers, Farm Street. The question in debate is whether the bequests for masses to the cathedral and to the Jesuit Fathers, Farm Street, are void and fall into the testator's residuary estate. It has been held both in the Court of First Instance and in the Court of Appeal that the gifts for masses for the soul of the testator are void. The appellants did not desire in their arguments in the courts below, or before your Lordships, to draw any distinction between gifts for masses simply and gifts for masses for the soul of the testator, saying that it would be well understood by Roman Catholics that the gifts contained in this will were for masses for the soul of the deceased.

It is not necessary to examine at any length the Ordinary of the Holy Mass. The mass is a sacramental service, of great solemnity to Roman Catholics. It was described during the argument in this House as the central supreme rite of the religion of Roman Catholics, without which their religion would be a mere husk. This service contains prayers for the dead which, according to the teaching of the Roman Catholic Church, presuppose the doctrine of purgatory, and that those who are in purgatory, being yet living members of Jesus Christ, may be relieved by the prayers of their fellow-members

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here on earth, as also by alms, and masses offered up to God for their souls. There was no controversy under this head. During the argument your Lordships were referred to certain portions in the Ordinary of the mass. The mass proper begins at the offertory, from which point onwards the prayers are invariable and do not change. In these prayers, invariably offered, there are included prayers for the dead, so that no mass can be celebrated in which prayers for the dead in purgatory are not an integral part. The following illustrations will suffice. "Suspice sancte Pater, omnipotens, æterne Deus, hanc immaculatam Hostiam, quam ego indignus famulus tuus offero tibi Deo meo vivo et vero, pro innumerabilibus peccatis, et offensionibus, et negligentiis meis, et pro omnibus circumstantibus; sed et pro omnibus fidelibus Christianis, vivis atque defunctis; ut mihi et illis proficiat ad salutem in vitam æternam."

"Memento etiam, Domine, famulorum famularumque tuorum N.; et N. qui nos præcesserunt cum signo fidei, et dormiunt in somno pacis."

"Ipsis, Domine, et omnibus is Christo quiescentibus, locum refrigerii, lucis et pacis, ut indulgeas, deprecamur. Per eumdem Christum, etc."

Apart from the doctrine of purgatory with its accompanying implication of pardons, there is no prohibition of prayers for souls of the dead to be found in the Anglican Liturgy, either in the Canons, or Articles, or the Book of Common Prayer. In the formula of faith, in the time of Henry VIII., prayers for the dead are enjoined as "pious and proper work." The first Liturgy of Edward VI., 1549, contained thanksgiving for all those saints "who now do rest in the sleep of peace"; prayer for "their everlasting peace," and that, "at the day of general Resurrection all they, which be of the mystical Body of the Lord, might be set on His right hand." Afterwards these prayers were removed from the Anglican Liturgy (5 & 6 Edw. 6, c. 1), but the Anglican Liturgy still retains a thanksgiving for all God's servants "departed this life in His faith and fear" and a prayer that "we with them may be partakers of His Heavenly Kingdom" and a request that

"God should accomplish the number of His elect and hasten His Kingdom." The doctrine of purgatory, however, with the accompanying implication of pardons is, in the 22nd Article, said to be "a fond thing vainly invented and grounded upon no warranty of Scripture, but rather repugnant to the Word of God." In the case of *Breeks* v. *Woolfrey* (1), the question was raised as to the legality of inscriptions "Pray for the soul of J. Woolfrey." "It is a holy and wholesome thought to pray for the dead." In the same case attention was called to an inscription in 1680 in the Cathedral of St. Asaph to Bishop Barrow: "O vos transeuntes in domum Domini, in domum orationis, orate pro conservo vestro, ut inveniat misericordiam in die Domini." It was argued that it was impossible to dissociate prayers for the dead from the doctrine of purgatory, and that prayers for the dead are so necessarily associated with the doctrine of purgatory as to form part of it. Sir H. Jenner in giving a judgment held that the prayers for the dead are not necessarily connected with the doctrine of purgatory, and dismissed the complaint. I desire to express my concurrence in this judgment and in the reasoning on which it is founded.

The first question for consideration is whether a bequest for masses, with the accompanying implication of purgatory and pardons, is a bequest for a superstitious use. The case of the respondents is based on the judicial interpretation of the Chantries Act, 1 Edw. 6, c. 14 (1547), and it is said that this interpretation has been so long adopted that it cannot now be displaced except by an act of the Legislature. I am not prepared to assent to this proposition, but in my opinion the case turns not on the construction which has been placed on the Chantries Act, but on the effect of 2 & 3 Will. 4, c. 115. It was not argued that, at the present date, either the common law or any statute still in force rendered the hearing or saying of the mass illegal, and no such argument could be maintained. The common law "knows of no prosecutions for mere opinions" (*Harrison* v. *Evans* (2)), and the statute of 23 Eliz. c. 1, which imposed a penalty for hearing or saying the mass,

(1) (1838) 1 Curt. 880, 902.

(2) 2 Burns' Eccl. Law, p. 207.

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has long been repealed. It has moreover been held that in other countries, in which the common law principles are applicable, but which are not subject to the provisions of the Chantries Act, a bequest for masses for prayers for the souls of the dead is not void, as being a bequest for superstitious uses. It is sufficient to refer to the Irish case of *O'Hanlon* v. *Logue* (1), to the Canadian case of *Elmsley* v. *Madden* (2), to the New Zealand case of *Carrigan* v. *Redwood* (3) and to the American cases of *Holland* v. *Alcock* (4) and *In re Schouler*. (5)

The Chantries Act does not in its enacting sections affect the validity of the bequest in debate, and no claim is made under these sections that the amount should be confiscated in favour of the Crown. The only section which deals with personal estate is s. 7, but this section is limited to "all and singular such sums of money, profits, commodities and emoluments, which by virtue of any manner of assurance, conveyance, composition, will, device or otherwise, heretofore have been given, assigned, limited, or appointed to have continuance for ever, which in any one year within five years next before the beginning of this present Parliament have been paid, etc." The section therefore is in terms limited to existing gifts in operation within the five years' limitation. A similar limitation is applied in the case of real estate so that, both in real and personal property, the enacting sections of the Act only extend to the confiscation of existing bequests, such as were operative within the preceding five years. It is not necessary to further consider these sections in detail. There is no question that if the Act could be made applicable, the bequests would come directly within the terms of its prohibition. It is said, however, that, although the Act is not directly effective in confiscating the bequest for the benefit of the Crown, yet it indicates the policy that such a bequest should be regarded as void, and that this view of the law has operated over such a long period of time that no

(1) [1906] 1 I. R. 247.
(2) 18 Grant, 386.
(3) 30 N. Z. L. R. 244.
(4) 108 N. Y. 312.
(5) 134 Mass. 426.

contrary decision could now be given without legislative authority. I cannot find any authority to support the conclusion that, prior to the Chantries Act, prayers for the souls of the dead in purgatory were prohibited or illegal, and on historical grounds it is highly improbable that such was the case. In Coke on Littleton, s. 135, it is said that they which hold in Frankalmoyne are bound of right before God to make orisons prayers and other divine services for the souls of their grantors or feoffors, or the souls of their heirs, which are dead, and that an abbot or priest may hold of his Lord by a certain Divine Service in certain to be done, as to sing a mass every Friday in the week for the souls, or to find a chaplain to sing a mass. Frankalmoyne is the tenure by which the majority of glebe lands in this country are held. In 23 Hen. 8, c. 10, it was forbidden that trusts of hereditaments for the purpose of having obits or annual funeral services should be performed during any longer period than twenty years. This statute is a Mortmain Act which recognizes the obits, and annual funeral services, but limits the length of time during which the obligations shall be performed. Later still, there is the will of Henry VIII., drawn up in 1544, and proved in 1547, which provides "for daily masses perpetual so long as the world endure."

The preamble of the Chantries Act does state, in distinct terms, that a great part of superstition and errors in Christian religion hath been brought into the minds and estimations of men, by devising and phantasing vain opinions of purgatory and masses satisfactory to be done for them which be departed, the which doctrine and vain opinion by nothing more is maintained and upholden, than by the abuse of trentals, chantries, and other provisions made for the continuance of the said blindness and ignorance. The preamble then proceeds to deal with erection of schools and the dissolution of chantries. In my opinion the preamble itself indicates, not that purgatory and masses are to be prohibited, but that property dedicated to these uses under the specified conditions is to be confiscable to the Crown, but whether this is so or not, it is not an admissible canon of construction

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to use the terms of a preamble in order to extend the provisions of an Act of Parliament beyond the limitations clearly expressed in the enacting sections, and thus to introduce an intention which the Legislature has not expressed, and which in reality is nothing more than a conjecture as to the supposed policy of the law. In *Kent County Council* v. *Lord Gerard* (1) Lord Herschell says: "My Lords, it would not be legitimate, in my opinion, to strain the language used in order to make it apply to a case to which it does not legitimately, in its terms, apply, on account of the supposed intention of the Legislature and the theory that that supposed intention can only be effectually carried out by giving to the words a meaning which they do not naturally bear."

I have already referred to the enacting sections in the Chantries Act which do confiscate property in favour of the Crown but which do not affect the bequest in debate in this appeal. There are other provisions in the Act which are inconsistent with construing the statute as implying any general prohibition of masses for the souls of the dead. Sect. 19 provides that neither the Act nor any article clause or matter contained in the same shall extend to any Colleges, Hostels or Halls within either of the Universities of Cambridge and Oxford, nor to any Chantry founded in any of the Colleges, Hostels or Halls being in the same universities; nor to the Free Chapel of St. George the Martyr, situate in the Castle of Windsor; nor to the college called St. Mary College of Winchester besides Winchester, of the Foundation of Bishop Wikeham; nor to the College of Eton; nor to certain other specified places other than to such Chantries, obits, lights and lamps, or any of them, as at any time within five years next before the beginning of the present Parliament have been had, used or maintained within the said Cathedral Churches. The five years' condition is again introduced, but is applied only to the Cathedral Churches, and not to Oxford or Cambridge or Winchester or Eton. The natural implication is that this provision gives exemption from confiscation under an Act of which the main purpose appears

(1) [1897] A. C. 633, 639.

to be not so much to prohibit prayers for the souls of the dead in purgatory as the vesting of certain properties in the Crown. The last section to which I propose to refer is s. 38. This section enacts that it shall not be lawful, by reason of any remainder, use or condition, to re-enter into, claim, or challenge any lands, tenements or hereditaments for the non-doing, non-naming or non-finding of any such priest or priests, or poor folks as is aforesaid, obit, anniversary, light or lamp from henceforth to be founded or done ; anything herein contained to the contrary in anywise notwithstanding. The word "obit" has a wide meaning, and would include masses for the souls of the dead. This section does not say that the masses referred to are prohibited as illegal, but, on the contrary, it contemplates the possibility of future foundations, and takes away the right of re-entry if any person or corporation settled land, and gave it upon trusts, which involved the so-called superstitious uses. I think the conclusion is that the bequests in debate in this appeal are not prohibited either directly or by implication under the Chantries Act.

There is no doubt that for a long series of years the hearing of mass or the saying of mass was made illegal by statute, and that, while this illegality was in force, a bequest for masses for the souls of the dead would be void and invalid. The statute 23 Eliz. c. 1, s. 4 (1581), makes the saying or hearing of the mass a criminal offence, so that after that date the question would be not whether a bequest for such a purpose created a superstitious use, but whether the bequest was confiscated to the Crown under the Chantries Act, or fell to be applied in some other manner. It is difficult to speak certainly of the date in reference to some of the older cases, but I do not think that prior to 1581 there was any case which can be said to have decided that bequests made subsequent to the passing of the Chantries Act came within its statutory prohibition. The case of *Adams and Lambert* (1) has been quoted in favour of the proposition that the effect of the Chantries Act was that all bequests, whether before

(1) 4 Rep. 104*b*.

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or after the Act, were within the policy of the law illegal, and thereby confiscable to the Crown. It is not easy to understand what is meant by the policy of the law to be derived from the statute of Chantries, or that the will of the Legislature can be ascertained in any other way than under the ordinary rules of construction, but the case is obscure on this point, and there is nothing to show that the impugned bequest was not within the specified date in the Chantries Act, and undoubtedly the gifts were for purposes directly within the words of that statute.

The first point decided in this case is that consanguinity in blood relationship does not create an exception, and that all persons, be they of the blood or not, are within the Chantries Act, and that lands given for superstitious uses would not be legal for a consideration of blood. The second point decided was that lands given in tail or for life for superstitious uses are within the statute; and thirdly, that a devise of the land not to the intent to find a priest, but upon condition to find him, is within the Act; and fourthly, that all the land in the case is given to the King, which was the principal point in the case and of great consequence. The judges then proceed to consider the five branches of the Act; but I cannot find any suggestion that the bequest in question was not in operation during the five years previous to the Chantries Act, in which case it was directly within its terms. There are two passages on which reliance was placed as showing that the Chantries Act imported a general prohibition of bequests for masses for the souls of the dead though not in operation for five years before the date of the passing of the Act, but I doubt whether this inference should be drawn, or that the case decided more than that lands devised in a particular way before the date of the Act are included within the operation of the enacting sections, construing this section in a wide sense, having regard to the terms of the preamble. There are a number of authorities quoted, but these do no more than show instances in which gifts for superstitious uses had been confiscated for the benefit of the Crown. In a number of these cases the gift was undoubtedly prior to

the Chantries Act, in others no date is given. In the case of the *Dean of St. Paul's* (1) the will of the testator is said to be dated anno 6 Eliz. c. 2. There must be some mistake in this reference, and it is hardly possible that in the sixth year of the reign of Elizabeth a will was made to assign and convey lands and tenements to the value of 14*l.* a year to the Dean and Chapter of St. Paul's, to find a competent sustentation yearly of 10 marks sterling for a priest, and his clerk, to sing mass every day for the testator's soul, and all Christian souls in the Church of St. Paul's; and the said Dean and Chapter ought to find bread, wine and candles, and all other ornaments for divine service; and all the other profits of the premises by the executors were assigned to be employed for the yearly obit for the said testator in the said church. The priest appears to have been maintained within the five years of the statute and at 6*l.* 13*s.* 4*d.* per annum, and it was found that the claim of the Queen was limited to this annual rent, and that the rest of the land did not belong to the Chantry but to the Dean and Chapter.

The next authority referred to in the argument is a treatise published by Duke in 1676 on the law of charitable uses. It is difficult to ascertain with accuracy whether the cases collected in Duke come within the enacting sections of the Chantries Act or not, and moreover at this date the statute of Elizabeth, which rendered the hearing and saying of the mass illegal, was still in force. In the case to which the Master of the Rolls refers, *Simon Peter's Case* (2), the donor was King Henry VII., and the gift was therefore clearly before the Chantries Act and within its provisions. There are other cases referred to by Duke at p. 466; but in many cases the date is not given, and is not capable of exact ascertainment. Whenever an actual date is given the bequest appears to have been made before the passing of the Chantries Act.

The next statute to be considered is 31 Geo. 3, c. 32, which, after enabling Roman Catholics to make a declaration on oath and reciting, among other Acts, the Act passed of 23 Eliz. c. 1 (1581), enacts that from and after June 24, 1791, no person

(1) Referred to in 4 Rep, at p. 109*a*.

(2) (1678) Duke (Bridgman's ed.), p. 126.

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professing the Roman Catholic religion, who shall take and subscribe the oath hereinbefore appointed to be taken and subscribed, shall be convicted or prosecuted upon, or shall be liable to be prosecuted upon, the said last recited statutes, or any of them. It is true that the relaxation which this statute allows is limited to Roman Catholics who have made the declaration, but it would be difficult to affirm that, whether a particular bequest is a superstitious use or not, can depend on whether a testator has or has not made a certain declaration on oath. Sect. 4 of the Act, after reciting certain of the old statutes, enacts that after the specified date, no person who shall take and subscribe the oath shall be prevented, indicted, sued, impeached, prosecuted or convicted, in any Civil or Ecclesiastical Court of this Realm, for being a Papist, or reputed Papist, or for professing or being educated in the Popish religion, or for hearing or saying mass. Sect. 17 of the Act contains a provision that nothing therein contained shall make it lawful to found any religious Order, and that all uses, trusts and dispositions, whether of real or personal property which immediately before the specified date shall be deemed to be superstitious or unlawful, shall continue to be so deemed and taken, anything in this Act contained notwithstanding. After the passing of this Act and before the date of 2 & 3 Will. 4, c. 115, the case of *Cary* v. *Abbot* (1) was decided by Sir William Grant. This case is of importance in the chain of judicial authority. Sir William Grant says: "There is no statute making superstitious uses void generally. The statute of Edward VI. relates only to superstitious uses of a particular description then existing. The statute of Henry VIII. (23 Hen. 8, c. 20) relates only to assurances of land to churches and chapels; which, if for a longer period than twenty years, it declares absolutely void."

The next Act 2 & 3 Will. 4, c. 115, is of great importance. It is called an Act for the better securing the Charitable Donations and Bequests of His Majesty's subjects in Great Britain professing the Roman Catholic religion, and extends to Roman

(1) 7 Ves. 490, 495.

Catholics the toleration which at this date had been extended to Protestant Dissenters. It recites that it is expedient to remove all doubts respecting the right of His Majesty's subjects professing the Roman Catholic religion in England and Wales to acquire and hold property necessary for religious worship, education and charitable purposes, and enacts that those who profess the Roman Catholic religion in respect of their schools, places for religious worship, education and charitable purposes, in Great Britain, and the property held therewith and the persons employed in or about the same, shall in respect thereof be subject to the same laws as the Protestant Dissenters are subject to in England in respect of their schools and places for religious worship, education and charitable purposes, and not further or otherwise. There is a further section that property acquired or held for the purpose of religious worship, educational and charitable purposes in England and Wales shall be subject to the provisions of the Act of Mortmain, thus contemplating the holding of the property for the purpose of religious worship but applying in reference thereto the principle of the Mortmain Act. I think that the effect of this statute is to place Roman Catholics on the same footing of toleration as Protestant Dissenters, and that it removes any illegality which might still be attached to the Roman Catholic religion in reference to their places for religious worship, education or charitable purposes, and the persons employed. The preamble of the Act recites the expediency of removing all doubts respecting the rights of His Majesty's subjects professing the Roman Catholic religion in England and Wales to acquire and hold property (inter alia) for religious worship. These words would include a right to acquire and hold property for the celebration of mass as part of the religious worship in the Roman Catholic religion, and a pious, or religious use, authorized by statute cannot, in my opinion, be regarded as superstitious. Apart, however, from the preamble, the provisions of the enacting section are in themselves sufficient to support the argument of the appellants that the Legislature, in legalising Roman Catholic places for religious worship, which must necessarily include an altar, the

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whole purpose of which is the celebration of the mass, could not have intended to have retained the principle that this essential and sacred service should be regarded as illegal, or that a bequest for masses should be regarded as a superstitious use. The same Act, moreover, legalises Roman Catholic schools in which the tenets of the Roman Catholic Church could and would be taught. It is very difficult to reconcile the statutory recognition of such schools with the continuance of a statutory condemnation of the most solemn of the rites of the Catholic Church, or with the continuance of a statutory disability founded on a judicial interpretation of the Chantries Act, rendering all bequests for masses void as bequests for superstitious uses.

The conclusion is that after the passing of this Act the saying and hearing of masses for the souls of the dead would no longer be regarded as illegal, and that the implication of the policy of law to be derived from the judicial construction of the Chantries Act has been displaced. When once the statutory illegality and disability have been removed, then, unless some disability can be found outside, there is nothing to hinder a bequest of money for masses for the souls of the dead or to render such bequests a superstitious use. The only outside disability which under such circumstances could attach to the bequest would be derived from the common law, but it cannot be suggested either that a recognized form of Christian faith, or that the special tenets held by the Roman Catholic Church on masses for the souls of the dead, can in any sense be regarded as contrary to the common law so as to render bequests for such purposes in the nature of superstitious uses and on that ground void and invalid.

Shortly after the passing of 2 & 3 Will. 4, c. 115, Lord Cottenham, then Sir Charles Pepys, decided the case of *West* v. *Shuttleworth*. (1) In this case the testatrix Townsend made a will and on the same day signed a testamentary paper containing the words "omitted in my will, chapels and priests" and adding "whatever I have left to priests or chapels, it is my wish and desire the sums may be paid as soon as possible,

(1) 2 My. & K. 684, 695, 697.

that I may have the benefit of their prayers and masses." It was held that the gift in respect of the priests and chapels was void and that the next of kin was entitled to the benefit of the failure of the gift. In giving his decision, Lord Cottenham expressed the view that the Chantries Act, although not including within its enacting sections the legacies in question, had been considered as establishing the illegality of the legacies to priests and chapels, and that he concurred in this construction of the statute. Lord Cottenham says: "The legacies in question are not within the terms of the statute of Edw. 6, but that statute has been considered as establishing the illegality of certain gifts, and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in Duke, been decided to be within the superstitious uses intended to be suppressed by that statute. I am therefore of opinion that these legacies to priests and chapels are void." This case, however, raises the question of the effect of 2 & 3 Will. 4, c. 115, and I do not think that Lord Cottenham gave full weight to the alterations which this statute introduced. As stated above, the construction of this statute appears to me to be the crucial issue in the present appeal. The statute 2 & 3 Will. 4, c. 115, says Lord Cottenham, "puts persons professing the Roman Catholic religion upon the same footing with respect to their schools, places for religious worship, education, and charitable purposes, as Protestant Dissenters. . . . . This Act makes it unnecessary to consider what was the state of the law, before it passed, with respect to such dispositions of property in favour of Roman Catholics. It is only necessary to inquire what is now the state of the law with respect to similar dispositions of property in favour of Protestant dissenters." This is a clear expression of the opinion held by Lord Cottenham in reference to all the dispositions of property which would be affected under the terms of the Act. Then Lord Cottenham says: "The gifts to priests and chapels remain to be considered, and these are not affected by the 2 & 3 Will. 4, c. 115, which applies only to schools, places for religious worship, education and charitable purposes."

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For reasons which have already been stated, I am unable to concur in this view expressed by Lord Cottenham, and am of opinion that this Act does apply not only to places of religious worship and schools, but to the vital tenets of the Roman Catholic Church, which are essentially and inevitably practised, in the places of religious worship, and essentially and inevitably taught, in the Roman Catholic schools. If this construction is right, then it is no longer necessary to consider what was the state of the law before the Act was passed.

The next case in order of date is *Attorney-General* v. *Fishmongers' Co.* (1), but the will of Sir Thomas Kneseworth was made in the year 1513, and he died in 1539, so it was unquestionably a case under the statute of Chantries, and it was not possible to maintain that the provision of loans for members of the Fishmongers' Company on the condition of saying Paternosters and Aves and a creed for the testator's soul, was not within the operation of the Chantries Act. It is not suggested that there has been a repeal of the enacting sections of that Act.

In *Heath* v. *Chapman* (2), Kindersley V.-C. follows the decision of *West* v. *Shuttleworth*. (3) He says that it is quite clear that, at all events before the 2 & 3 Will. 4, c. 115, it was commonly assumed to be the law, and the assumption was acted upon that a gift to a priest for masses for the repose of the testator's soul, or a gift to a priest to say masses generally, was superstitious and void, and adds : " The way in which this came to be the law is this : at the time of the passing of the statute of Edw. 6 such gifts were void."

My Lords, for reasons already stated I think that such gifts were not void at the date of the passing of the statute of Edward VI., and that at that date such bequests were not superstitious, either under statutory disability, or under any principle known to the common law. Assuming, however, the construction placed by Kindersley V.-C. on the Chantries Act to be correct, and that there was no doubt of the law

(1) 5 My. & Cr. 11. (2) 2 Drew. 417, 423, 424.
(3) 2 My. & K. 684.

at least down to the statute of William IV., the Vice-Chancellor, following the decision of Lord Cottenham in *West* v. *Shuttleworth* (1), placed the same construction on that statute. He says: "Then what did that statute do? If it had meant to alter the law with respect to superstitious uses, certainly it uses the most singularly inapt words that could be well imagined for the purpose. But in truth there is no such indication of intention in the Act at all. What it intended was this: As to their places of worship, as to their places of education, and as to the employment of persons officiating in their ceremonial, it intended to put Roman Catholics on the same footing as Protestant Dissenters. But it does not refer at all to the purposes to which property is devoted, which, if superstitious, still render the gift void. No doubt, if property is given for the use of a place of worship, that is good; but the statute leaves quite untouched the case where property is given for superstitious uses. That is the view taken in *West* v. *Shuttleworth* (1), with respect to which I must say, that besides feeling myself bound to follow it, even if I did not entirely agree with it, I do in fact entirely subscribe to the correctness of the reasoning in it." With all submission to the view of the learned Vice-Chancellor I think that the statute does refer to the purposes to which property is devoted and, as stated above, is inconsistent with the doctrine that bequests for masses for the souls of the dead should be regarded as in the nature of a superstitious use *Heath* v. *Chapman* (2) is founded on *West* v. *Shuttleworth* (1), and they stand or fall together.

There are two more cases, which came before Sir John Romilly. The first is *In re Michel's Trust.* (3) It is the will of a Jew who made a bequest to take effect upon the death of his widow. It is not necessary to state the terms of the will at length, but it was argued that the gift was void as a superstitious use, as an anniversary or obit. The cases of *Adams and Lambert* (4), *West* v. *Shuttleworth* (1), and *Heath* v. *Chapman* (2), were cited. Sir John Romilly had no doubt

(1) 2 My. & K. 684.
(2) 2 Drew. 417, 423, 424.
(3) 28 Beav. 39, 42.
(4) 4 Rep. 104*b*.

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as to the validity of the bequest, stating that, with regard to Jewish charities, they are now placed in the same position as those of Protestant Dissenters, and that a similar operation, by Act of Parliament, had formerly been effected with regard to Roman Catholic charities. He then adds: "In regard to *West* v. *Shuttleworth* (1) and *Heath* v. *Chapman* (2) I have always felt this difficulty: so far as relates to their places for religious worship, and the property held therewith, Roman Catholics and Jews are now placed in the same position as Protestant Dissenters; and if it be part of the forms of their religion, that prayers should be said for the benefit of the souls of deceased persons, it would be difficult to say that, as a religious ceremony practised by a dissenting class of religionists, it could be deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in question, which practically have authorized them. In the time of Edward the Sixth and Elizabeth the ceremony of mass was considered superstitious, and I do not know that the law made any distinction between masses generally and masses for souls, or any distinction between those said for the general purpose and object of their religion in the worship of God and those which are for more limited objects, which were formerly considered superstitious and which the Court now, considering them in a Protestant point of view, still regards as superstitious. I express no opinion on this point however, as no such case arises here." My Lords, I agree in the view indicated by Sir John Romilly. If places of worship are authorized by statute for the use of Roman Catholics, and it is known that the services of the Roman Catholic Church include, as an essential part of their liturgy, that prayers should be said for the benefit of the souls of the deceased persons in purgatory, it is difficult to say that such a religious ceremony, practised in a place of worship directly authorized by statute, can be deemed superstitious in the legal sense, in which these words were used, prior to the passing of the statutes in which this authority was given, and that bequests for masses for such prayers can be deemed a superstitious use.

(1) 2 My. & K. 684. (2) 2 Drew. 417, 423, 424.

In a subsequent case of *In re Blundell's Trusts* (1) Sir John Romilly thus expresses his opinion: "I expressed my difficulty, in the case referred to (*Michel's Trust* (2)), as to whether gifts for religious ceremonies practised by a dissenting class of religionists might not be permitted, if not opposed to public morality; but I think the decided cases too strong, and that the House of Lords can alone alter the settled law. It is clear that I must act on *West* v. *Shuttleworth*, which I cannot overrule." There are only two cases of later date which have any bearing upon this appeal: *Yeap Cheah Neo* v. *Ong Cheng Neo* (3) and *Bowman* v. *Secular Society*. (4) In the first of these cases there is a reference to the case of *West* v. *Shuttleworth* (5), but no discussion as to the reasoning of the decision, and in the second case Lord Parker refers, but only by way of illustration, to the principle that a trust to procure masses to be said for the testator's soul is not lawful. In the same case, Lord Buckmaster, dealing with the Jewish Disabilities Act, says: "There was never anything, apart from statutory disabilities, to prevent Protestant Dissenters from holding property: *Attorney-General* v. *Pearson*. (6) Of course, while any particular belief was made the subject of penalty by statute, a gift to further the purpose of that belief would be contrary to the statute law; but when once the statutory disability was removed, unless some disability could be found outside, there could be nothing to hinder the gift of money for the purpose of any such association. It is this that explains the case of *West* v. *Shuttleworth* (5), which was a decision on the statute in relief of Roman Catholics similar to that in relief of Jews (2 & 3 Will. 4, c. 115). Now the Roman Catholic religion—whatever views may be taken of the Reformation—was certainly never contrary to the common law; and therefore, when once the statutory prohibitions were taken away, the receipt of money for the general purpose of their faith was not forbidden."

My Lords, the words used, "the general purpose of their

(1) 30 Beav. 360, 362.
(2) 28 Beav. 39, 42.
(3) L. R. 6 P. C. 381.
(4) [1917] A. C. 406, 474.
(5) 2 My. & K. 684.
(6) 3 Mer. 353.

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faith," are undoubtedly of wide meaning; but after hearing the full argument addressed to your Lordships in the present case, I desire to express my entire concurrence in the language used by Lord Buckmaster, and to add that in my opinion all statutory prohibitions have been taken away which could in any way operate to render void a bequest for masses for souls of the dead that is not within the limitations in the enacting sections of the Chantries Act, and that, apart from statutory prohibitions, such bequests cannot be regarded as void or invalid.

There are two matters which remain for consideration under this portion of the appeal. It was argued that whatever might be the meaning and construction of the statutes involved, yet a long course of judicial interpretation should not, at this date, be set aside by a decision of this House, and that the only remedy applicable was an Act of the Legislature. The leading case is that of *Morgan* v. *Crawshay*. (1) The question in that case was whether the statute of Elizabeth passed in 1601 authorized the rating, for poor law purposes, of mines other than coal mines. Martin B., in delivering the unanimous opinion of the judges, states the conditions on which the decision was founded, that the Poor Law Act was passed in 1601, and that the point in dispute, whether any other mines except coal mines are rateable to poor rate, had been the subject of very many decisions reported in the books, and from the time of its enactment the practice has been uniform, that no mines, except coal mines, have ever been rated; and although the reported cases do not commence so early, yet so far as they are known, there has been one invariable, uniform and constant flow of decisions all one way that, except coal mines, no other mines are rateable. Accepting this statement, Lord Chelmsford, in giving his opinion, states: "After this long-continued course of dicta and decisions, unless your Lordships entertained the strongest opinion that the first decision on the subject was erroneous, and all the cases that followed were merely echoes of the first, you would be most unwilling to pronounce a condemnation

(1) L. R. 5 H. L. 304, 319.

of the judgments which have been given, and of the practice which has uniformly prevailed for so long a period, for the exemption of all other mines except coal mines from liability to be rated for the relief of the poor."

My Lords, this principle is not applicable to the interpretation of 2 & 3 Will. 4, c. 115, which really depends upon the single decision of Lord Cottenham in *West* v. *Shuttleworth* (1) —a decision considered doubtful by Sir John Romilly, although he felt himself bound by authority to act upon it. I desire to refer to the cases of *Clyde Navigation Trustees* v. *Laird* (2) and of the *Associated Newspapers, Ld.* v. *London Corporation.* (3) In my opinion your Lordships are bound to determine the true import of 2 & 3 Will. 4, c. 115. There is no principle as to contemporanea expositio, or on any other ground, which—in the state of the decisions relevant to this appeal—interferes with the ordinary course of construction. There has been no long series of uniform and invariable decisions, and it is not material in construing the Act of Will. IV. whether that Act has been in operation for a period of nearly one hundred years, or has recently found a place in the Statute Book.

It was further argued that the statute 23 & 24 Vict. c. 134 did recognize and affirm that there are tenets of the Roman Catholic religion which are superstitious, and that bequests for such tenets are in the nature of superstitious uses. My Lords, in my opinion this Act is a remedial Act, having for its object that bequests for lawful purposes are not to be invalidated, by the addition of an unlawful purpose, but that the property may be appropriated and applied to lawful purposes.

At the date when the Act was passed there were unquestionably in operation the legal decisions of Lord Cottenham based on his construction of 2 & 3 Will. IV., though these decisions had been doubted by Sir John Romilly. These decisions did keep alive the doctrine of superstitious uses as applicable to a bequest for masses for the souls of the

(1) 2 My. & K. 684. (2) 8 App. Cas. 658.
(3) [1916] 2 A. C. 429.

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dead, and in that state of the law it was desirable that charities for the exclusive benefit of persons professing the Roman Catholic religion should not be invalidated by reason only that the estate has been, or shall be, also subjected to any trust or provision deemed to be superstitious or otherwise prohibited by the laws affecting the Roman Catholic religion. If, however, the judgment of your Lordships is that the decisions in operation in 1860 should be overruled, it cannot be that the effect of the Roman Catholic Charities Act is to recreate the doctrine of superstitious uses, although the effect may be, that the remedies which the Act provides are no longer necessary.

There is a further matter for the consideration of this House on the appeal. The Act 10 Geo. 4, c. 7, contains provisions respecting the suppression or prohibition of the religious orders and societies of the Church of Rome bound by monastic or religious vows, and there is a special section in the Roman Catholic Charities Act, 1860, that nothing contained in that Act shall be taken to repeal or in any way alter such provisions. It was argued on behalf of the respondents that the bequest of 200*l.* to the Jesuit Fathers, Farm Street, for masses, and the bequest of the residuary estate for the same purpose, were invalid or contrary to the policy of 10 Geo. 4, c. 7, in accordance with numerous decisions in the Irish Courts.

My Lords, if on the true construction of the will these bequests to the Jesuit Fathers had been made to religious orders or societies of the Church of Rome bound by monastic or religious vows, it would follow that they were void and invalid, but in my opinion no such bequests have been made, and a gift to certain members of an order, which is expressed to be given to them, not for the benefit of the order, but upon a separate charitable trust, does not fail on account of any disability affecting the trustee.

In my opinion the judgments of Wickens V.-C. in *Cocks* v. *Manners* (1), and of Joyce J. in *In re Smith* (2), should be followed.

(1) L. R. 12 Eq. 574. (2) [1914] 1 Ch. 937.

My Lords, the appeal should be allowed with costs, and persons professing the Roman Catholic religion will no longer be debarred from making bequests for masses for the souls of the dead, in conformity with a sacred and sacramental rite, which is an essential and integral part of a service of great solemnity in the liturgy of the Roman Catholic Church.

LORD WRENBURY. My Lords, the sacrifice of the Holy Mass is the most solemn service of the Roman Catholic Church. There is a religious obligation to attend and hear mass—an essential part of the service is prayer for the souls of the departed. The purpose of those prayers is the relief of the souls in purgatory. The doctrine of purgatory is an essential part of the Roman Catholic faith. A testamentary disposition for the purpose of procuring masses to be said for the soul of a testator is consequently a disposition necessarily involving an affirmation and belief of the doctrine of purgatory. The question is whether such a disposition is legal.

From the fact that to-day neither the common law nor any statute forbids the saying or hearing of mass, it does not follow that a disposition to procure masses for the dead is legal. The common law "knows of no prosecution for mere opinions": *Harrison* v. *Evans*.(1) The statute law which in 1581 (23 Eliz. c. 1) imposed a penalty for saying or hearing mass was mitigated in 1791 by the statute 31 Geo. 3, c. 32, and has long since been repealed. Anyone may lawfully say or hear mass whether it is superstitious or not. But it remains that if a statute has regarded it as a mischief that dying men may be induced to disregard the legitimate claims of their children or other dependents and make dispositions in favour of the Church with a view to saving their souls from the pains of purgatory: if a statute has declared the doctrine of purgatory to be superstitious, a disposition to procure masses for the dead is illegal. The question is as to the law on this point.

In 1547 the statute of Chantries (1 Edw. 6, c. 14) contained a preamble in the following words: "Considering that a

(1) 2 Burns' Eccl. Law, 207, 218.

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great part of superstition and errors in Christian religion hath been brought into the minds and estimations of men, by reason of the ignorance of their very true and perfect salvation through the death of Jesus Christ, and by devising and phantasing vain opinions of purgatory and masses satisfactory to be done for them which be departed, the which doctrine and vain opinion by nothing more is maintained and upholden, than by the abuse of trentals, chantries, and other provisions made for the continuance of the said blindness and ignorance." The operative part of the Act had the effect of giving to the King chantries "in esse within five years next before the first day of this Parliament" and lands, etc., which had been assured to the finding of any priest to have continuance for ever, etc., whereby any priest was sustained, etc., "within five years next before the first day of this present Parliament" and lands "heretofore" given to found or maintain any anniversary or obit or other like thing, intent or purpose to have continuance for ever, and money given "within five years, etc.," for finding, maintaining, etc., any priest or priests, of any anniversary or obit, etc., or other like thing, and contained further in s. 38 a contemplation of finding a priest or maintaining an obit, etc., in the future by the use of the words "henceforth to be founded or done." That s. 38 is one which prevents a remainderman from entering on lands for the non-doing, non-naming or non-finding of a priest, obit, anniversary, etc., "from henceforth to be founded or done." The statute of Chantries is one not of general application, but a statute which in the cases to which it applies does not annul the disposition or gift but substitutes the King as the person to take. In this state of things it is possible to regard the preamble either (1.) as a recital of a state of facts confined in its operation to the particular matters dealt with expressly in the operative part, or (2.) as a recital which contemplates a general operation with the result that in the cases not specially dealt with by the operative part the lands, money, etc., are to go in due course of law upon the footing that the disposition declared by the preamble to be superstitious is not to take effect.

The appellants say that at common law the doctrine and faith of Roman Catholics were never at any time illegal; that at common law gifts for masses never were and are not unlawful. The respondents do not contest these propositions. I have found no authority to the contrary, and I take it that this is so. Having regard to the different forms of religious faith which from time to time have been held or established in this country, it would be strange if it were otherwise. Under these circumstances, it is to the statute law that I must look to find whether the doctrine of purgatory was and is a superstition and whether a gift for masses for the dead is consequently illegal. The first question, therefore, for consideration is as to the effect of the statute of Chantries, introduced as it is by the preamble which I have set out.

The earliest guidance I have in approaching this question is to be found in *Adams and Lambert's Case* (1), decided in 44 & 45 Eliz., 55 years after the statute of Chantries. It was a case upon that Act and it had to do with dispositions falling within the Act. It has, therefore, no direct application to cases not falling within the different cases mentioned in the enacting part of the Act, and the passages I am about to quote are, therefore, for the present purpose no more than dicta. Further, in 1602, I have no doubt that opinion may not have been so fully formed as it has been later as to the extent to which resort may be had to a preamble to ascertain or control the law. On the other hand these dicta are more than 300 years old. They are dicta upon the meaning and intention of an Act of Parliament 360 years old, and they must in my judgment carry very great weight in ascertaining what was the meaning and intention of the Act. The passages to which I refer are to be found in *Adams and Lambert's Case* (1) at the pages which I am about to note.

"The intent and meaning of the Act, as appears by the preamble, was to extirpate out of men's minds these superstitious errors, and to take them utterly away" (p. 106*b*). This was, it is true, said in the matter of contrasting gifts to superstitious uses which were to have continuance for ever,

(1) 4 Rep. 104*b*.

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with those which were determinable: but is valuable as showing that resort was had to the preamble to determine the intent and meaning of the Act. Again at p. 109*b* "the intent of the Act was to prohibit all superstitious uses, which were public in churches for the general prejudice which might accrue by them." Again at p. 111 (*b*), "the intention of the Act (as hath been said, and so it ought to be expounded,) was to take away all such superstition." At p. 113*a* "by the equity of the said Act which intended to extirpate all praying for souls."

Here again I must add that it is not easy to say whether all these are utterances of the Court or whether some and which of them are observations by Coke. But whether they be the one or the other they are certainly entitled to great weight, and I attach the greatest importance to them.

Starting then with the dates of 1547 and 1602 the next material to which I can resort is in 1835. In that year Lord Cottenham (then Master of the Rolls) decided *West* v. *Shuttleworth* (1), a decision which for success on this appeal the appellants must induce your Lordships to overrule. Sir William Grant in *Cary* v. *Abbot* (2) had said that there is no statute making superstitious uses void generally. After referring to that passage Lord Cottenham in *West* v. *Shuttleworth* (1) held that gifts to priests or chapels "that I may have the benefit of their prayers and masses" were void as being within the superstitious uses intended to be suppressed by the statute of Chantries. He said this: "The legacies in question, therefore, are not within the terms of the statute of Edward 6, but that statute has been considered as establishing the illegality of certain gifts, and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in Duke, been decided to be within the superstitious uses intended to be suppressed by that statute." In *West* v. *Shuttleworth* (1) I do not find that *Adams and Lambert's Case* (3) is noted by the reporter as having been cited. Neither is it noted as having been cited in

(1) 2 My. & K. 684, 697. (2) 7 Ves. 490.
(3) 4 Rep. 104*b*.

Cary v. *Abbot* (1), a case to which Lord Cottenham refers. But, inasmuch as he refers to Duke, who at p. 460 quotes *Adams and Lambert's Case* (2) at considerable length, it is plain that Lord Cottenham had *Adams and Lambert's Case* (2) before him. I have no doubt, and Mr. Russell in fact agreed, that when Lord Cottenham said "that statute has been considered," he was referring to and must have had in mind, amongst other decisions, the case of *Adams and Lambert* (2) and the observations upon the statute made in that case to which I have referred.

In 1841 in *Attorney-General* v. *Fishmongers' Co.* (*Knesworth's Will*) (3), Lord Cottenham, after dealing with the case on another ground, said: "Even if that were not so, the gift was superstitious and void under" the statute of Chantries, and again in *Attorney-General* v. *Fishmonger's Co.* (*Preston's Will*) (4) his Lordship quotes from *Adams and Lambert's Case* (2) the following passage: "for inasmuch as all the profits are limited to superstitious uses, it was the intent of the Act" (1 Edw. 6, c. 14) "to give all the land to the King, by a reasonable construction upon the coherence and intention of all the parts of the Act."

To complete the historical statement, Lord Cottenham's decision in *West* v. *Shuttleworth* (5) was followed in 1854 in *Heath* v. *Chapman* (6), when Kindersley V.-C. said that the statute "gives to the Crown certain property devoted to such uses, but it stamps all such uses as superstitious"; in 1860 in *In re Michel's Trust* (7); and in 1861 in *In re Blundell's Trusts.* (8) Down to the present time this course of authority has remained undisturbed. In *Yeap Cheah Neo* v. *Ong Cheng Neo* (9), the decision in *West* v. *Shuttleworth* (5) was referred to in the Privy Council and treated as good law, and in *Bowman* v. *Secular Society* (10), Lord Parker in this House states (by way of illustration merely) that a trust to procure masses to be said for the testator's soul is unlawful.

My Lords, the question which has most weighed with me

(1) 7 Ves. 490.
(2) 4 Rep. 104*b*.
(3) 5 My. & Cr. 11, 16.
(4) 5 M. & Cr. 16, 24.
(5) 2 My. & K. 684, 697.
(6) 2 Drew. 417, 424.
(7) 28 Beav. 39.
(8) 30 Beav. 360.
(9) L. R. 6 P. C. 381, 396.
(10) [1917] A. C. 406, 437.

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in this case is the following: There is a statute passed in 1547—an opinion was expressed upon its true construction in 1602—the construction accepted in 1602 was acted upon judicially in 1835—that judicial decision has been accepted ever since. Is it—I will not say competent to your Lordships for you have no doubt authority to overrule Lord Cottenham's decision of 1835—but is it expedient and in accordance with principles upon which this House has often acted that you should substitute your own opinion upon construction (assuming that you doubt or do not agree with the construction so long since adopted) for an opinion of such antiquity and which has so long stood unchallenged? My Lords, I think not. As regards real property, authority is not wanting that a Court competent to overrule a decision of long standing which has been long accepted will not overrule it if it will affect titles taken on the footing of the decision. The principle is not, I think, confined to cases of that kind. Here dying men must for centuries have made their wills on the footing that they could not legally make disposition of real estate or of personal estate so as to provide for the saying of masses for their souls, and must have disposed of their property otherwise for that reason. Where gifts have been made to provide masses they must have been and in fact have been successfully attacked on that ground. Certainty in the law is a thing greatly to be desired. Acquiescence in the existing law as determined by existing decisions of long standing is preferable, I think, to a disruption of existing rights.

Let me give instances in which such principles as the above have been followed: "Length of time," said Lord Eldon in *Attorney-General* v. *Mayor of Bristol* (1), where the question was as to the true construction of a deed, "Length of time .... is a very material consideration, when the question is, what is the effect and true construction of the instrument?" But for the present purpose I would refer rather to cases where the question was as to the construction of a statute. In *Morgan* v. *Crawshay* (2), the statute 43 Eliz. c. 2, s. 1, having made "coal mines" rateable for poor rate the question was whether

(1) 2 Jac. & W. 294, 321. (2) L. R. 5 H. L. 304.

iron mines were rateable. Your Lordships' House held that they were not. There had been decisions extending back to 1762 that mines other than coal mines were not rateable. In 1831 Lord Tenterden in *Rex* v. *Inhabitants of Sedgley* (1) had said : " I must confess, that much that has been thus said is by no means satisfactory to my own mind, and that I feel great difficulty in an endeavour to reconcile the several dicta with each other. *But it is not necessary to do this.* The rule of construction has been established and acted upon for a long time, and ought to be adhered to, unless we could say positively that it is wrong, and productive of inconvenience." In *Morgan* v. *Crawshay* (2) in your Lordships' House Lord Chelmsford was, I think, of opinion that the previous decisions were right, while Lord Westbury on the other hand would have been much inclined to quarrel with them, but both thought that they should not be disturbed. " We must," said Lord Westbury, " bow to the uniform interpretation which has been put upon the statute of Elizabeth, and must not attempt to disturb the exposition which it has received." And he concluded by saying : " I hope, therefore, that your Lordships will concur in the conclusion that, *upon that ground alone*, this appeal ought to be dismissed."

Ex parte Willey (3) is again a case upon the construction of a statute, namely, the Bankruptcy Act, 1869. It is not a decision of this House but of the Court of Appeal. Sir George Jessel, M.R., after stating his practice to be to form and express his own opinion upon the construction of an Act, went on to say that there was one peculiar case which was exceptional. " Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs."

In *Tancred, Arrol & Co.* v. *Steel Co. of Scotland* (4), the

(1) 2 B. & Ad. 65, 73.
(2) L. R. 5 H. L. 304.
(3) 23 Ch. D. 118, 127.
(4) 15 App. Cas. 125, 141.

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question was as to the effect of a contract to one of whose provisions a well settled proposition of Scotch law was said to be applicable. This House held that it was applicable, and Lord Herschell used these words : " That doctrine having been laid down so long ago, *whether it rests upon any sound basis or not*, it would be most improper to depart from it now, because one would be really altering the contract between the parties ; for we have a right to suppose that they have entered into it upon the basis of that which for nearly a century has been understood to be the law." In *Associated Newspapers* v. *London Corporation* (1) your Lordships by a majority overruled *Sion College* v. *London Corporation* (2) (a decision then fifteen years old) because the majority of your Lordships were of opinion that decisions in 1790, 1800 and 1828 upon which that case proceeded had not the result which the Court of Appeal in the *Sion College Case* attributed to them. Lord Sumner did not take that view of the earlier decisions, and he said, " I conceive that the case falls within Lord Westbury's well known words in *Morgan* v. *Crawshay* (3) . . . . and that after the lapse of 126 years this long standing construction should not be overruled." Had your Lordships taken the view which Lord Sumner took of the earlier decisions you would all, I think, have acquiesced in that sentence. Lastly in *Bowman* v. *Secular Society* (4), Lord Sumner again says that if a maxim " expresses a positive rule of law, once established, though long ago, time cannot abolish it nor disfavour make it obsolete. The decisions which refer to such a maxim " (as he has mentioned) " are numerous and old, and although none of them is a decision of this House, if they are in agreement and if such is their effect, I apprehend they would not now be overruled, *however little reason might incline your Lordships to concur in them.*"

My Lords, the cases to which I have referred seem to me fully to bear out my statement that the principle of maintaining a view of the law based upon authoritative opinion or judicial decision of long standing is not confined to cases in

(1) [1916] 2 A. C. 429, 451.
(2) [1901] 1 K. B. 617.
(3) L. R. 5 H. L. 304, 320.
(4) [1917] A. C. 406, 454.

which titles would be affected by its review. The principle is one of general application to all cases in which the Court which has power to overrule finds that mankind have for many years conducted their affairs upon the footing of a certain recognized state of the law. It is a principle which recognizes the importance of certainty and finality—and which, under circumstances, refuses to disturb after a certain lapse of time a doctrine "whether," to use Lord Herschell's words, "it rests upon any sound basis or not."

My Lords, to apply these considerations to the present case. The question is as to the true construction of a statute of 1547 (372 years ago). In *Adams and Lambert's Case* (1) a case decided in 1602 (317 years ago), views were expressed upon its construction, upon its meaning and intention in the terms which I have quoted. In *West* v. *Shuttleworth* (2) Lord Cottenham 84 years ago, referring to those considerations, decided the exact point now before your Lordships for decision. In 1854, 1860 and 1861 the decision in *West* v. *Shuttleworth* (2) was followed, not always, I agree, without adverse comment. In 1875 the authority of the decision was recognized in the Privy Council. (3) In 1917 the doctrine that a gift to procure masses to be said for the testator's soul is void (the doctrine that is laid down in *West* v. *Shuttleworth* (2)) was in your Lordships' House stated to be good law.

My Lords, under these circumstances I am not prepared to review the law and to say that *West* v. *Shuttleworth* (2) is wrong. Were I much more persuaded than I am that if the matter were res integra the decision ought to be the other way, I should still be of opinion that upon principle and upon authority that decision ought to be maintained. I may say, however, that the statute 23 & 24 Vict. c. 134 does in my opinion recognize and affirm that there are tenets of the Roman Catholic religion which are superstitious, and that trusts which are superstitious are not lawful charitable trusts. The Act provides machinery for this Court to substitute other trusts to take effect "in lieu of the superstitious trusts."

(1) 4 Rep. 104*b*. (2) 2 My. & K. 684.
(3) L. R. 6 P. C. 396.

H. L. (E.) 1919 BOURNE v. KEANE. Lord Wrenbury.

My Lords, under these circumstances I do not find it necessary to consider and determine for myself exactly what reliance can be placed upon the language of the preamble to the 1 Edw. 6, c. 14, or to follow the respondent's contention upon the statute of 10 Geo. 4, c. 7, and see whether these gifts were to persons bound by monastic vows. I rest my judgment upon the point which I have principally discussed, and hold that the decision in *West* v. *Shuttleworth* (1) ought not to be disturbed. If complete freedom of religious belief, which all would, I think, to-day be desirous of giving, ought to be supplemented by removing illegality from dispositions such as are in question in this case, the matter is, I think, one for the Legislature. This appeal ought, in my judgment, to be dismissed.

Order of the Court of Appeal reversed. Order of Eve J. discharged, so far as it declares that the gifts for masses, given by the will of the testator to (1.) *the Westminster Cathedral;* (2.) *the Jesuit Fathers, and* (3.) *the Dominican Fathers, and also the gift thereby given of what money remains after all expenses to the Jesuit Fathers for masses, are void and fall into the testator's residuary estate, and so far as it declares that the testator's next of kin are entitled to the said residuary estate, and so far as it orders an enquiry as to the testator's next of kin: Declared that the said gifts are valid and the said gift of what money remains after all expenses is sufficient to pass the residuary personal estate of the said testator. Further ordered, by consent, that the costs of all parties in the Court of Appeal, and in respect of the appeal to this House, be paid out of the said residuary personal estate. Lords' Journals*, June 3, 1919.

Solicitors for the appellants: *Witham, Roskell, Munster & Weld.*

Solicitor for the respondent, Catherine Broderick: *Herbert Z. Deane.*

(1) 2 My. & K. 684.

[PRIVY COUNCIL.]

. C.*

19

May 26.

WHITE . . . . . APPELLANT;

AND

THE LICENSING COURT . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

South Australia—Licensing—Local Option Poll—Resolution not to increase or reduce—Discretion of Licensing Court—Refusal to renew—Licensing Act (No. 970 of 1908, South Australia), ss. 59, 183, 200.

The adoption by the electors upon a Local Option Poll under Part V. of the Licensing Act, 1908 (South Australia), of resolution 2 provided for by s. 183 of that Act, namely, that the number of licences be not increased or reduced, does not preclude the Licensing Court from exercising the absolute discretion given to the licensing authority by s. 59 of the Act to refuse to renew a licence.

Judgment of the High Court of Australia affirmed.

APPEAL by special leave from a judgment of the High Court of Australia (February 27, 1918) reversing a judgment of the Supreme Court of South Australia.

The electors of a Local Option district upon a Local Option Poll under Part V. of the Licensing Act (No. 970 of 1908, South Australia) adopted resolution 2 provided for by s. 183 of the Act. The question for determination in the appeal was whether, as the appellant contended, the Licensing Court was thereby precluded from exercising the absolute discretion given by s. 59 to the licensing authority to refuse to renew a licence in the Local Option district.

The material provisions of the Act appear from the judgment of their Lordships.

The appeal to the High Court of Australia is reported at 24 C. L. R. 318.

1919. April 29. *G. J. Talbot K.C.* and *Wootten* for the appellant.

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, VISCOUNT CAVE, LORD DUNEDIN, and LORD SHAW OF DUNFERMLINE.

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Hon. F. Russell K.C. and *Whinney* for the respondents.

The arguments of counsel were based entirely upon the provisions of the Act, and are sufficiently indicated by the judgment.

May 26. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal by special leave from a judgment of the High Court of Australia dated February 27, 1918, reversing a decision of the Supreme Court of South Australia and discharging a writ of prohibition issued by that Court. The writ in question prohibited the Licensing Court from hearing, inquiring into, and determining the objection of Thomas Henry Davey, the Chief Inspector of licensed premises at Adelaide, to the renewal of a publican's licence held by the appellant, William Thomas White, in respect of certain licensed premises at Adelaide known as the Adelaide Hotel; and the question involved in this appeal is whether, on the true construction of the Licensing Act, 1908, of South Australia (No. 970 of 1908), and in the events which have happened, the Licensing Court had jurisdiction to hear and determine that objection.

It will be convenient in the first place to refer to the material provisions of the Licensing Act, 1908.

Under Part II. of the Act the Governor may by order declare that any area in South Australia shall constitute a licensing district, and may nominate a Licensing Bench for that district (s. 5). By virtue of the Licensing Acts Further Amendment Act (No. 2), 1915 (No. 1236 of 1915), the Licensing Benches have been abolished, and the powers formerly entrusted to those Benches have become vested in the Licensing Court.

Under Part III. of the Act of 1908, no person may sell intoxicating liquors by retail without being licensed so to do under the Act (s. 11). Licences are of different classes, such as publican's licences, storekeeper's licences, wine licences, etc. (s. 15). Every licence granted under the Act remains in force until March 25 in the following year, but no longer (s. 28). An application for renewal must be made to the Clerk of the

Court (s. 41), who is to give notice of the application to the police and to the Inspector for the district (s. 42); and notice of objection must also be served upon the applicant (s. 46). The objections which may be taken to the renewal of a publican's licence are set out in detail in s. 47 of the Act, and may be summarised as follows: (1.) Objections to the character of the applicant, e.g., that he is of bad character or of drunken habits, or is interested in keeping a house of ill fame. (2.) Objections to the conduct of the house, e.g., that it is of a disorderly character or is frequented by prostitutes, thieves, or persons of bad character, or that the management of the house has not been satisfactory. (3.) Objections to the structure of the premises, e.g., that there is direct communication with unlicensed premises, that a direction of the Court as to additional accommodation has not been complied with, or that the accommodation is unsuitable or insufficient. (4.) An objection that the licensing of the premises is not required for the accommodation of the public. Provision is also made for the forfeiture of a licence on the conviction of the holder or on his default in other respects (ss. 69–74).

Sect. 59 of the Act is as follows: "(1.) No licence shall be renewed nor shall any application be granted as a matter of course; and upon the hearing of any application for the grant, renewal, transfer, or removal of a licence, whether notice of objection has been delivered or not, and whether objection is taken at the hearing or not, the Bench shall hear, inquire into, and determine the application and all such objections (if any) on the merits, and shall grant or refuse the application upon any ground which, entirely in the exercise of its discretion, it deems sufficient; and against such grant or refusal there shall be no appeal. (2.) It shall not be necessary for the Bench to state the ground or reason for its decision to grant or refuse such application; or, if refused, to state upon what (if any) particular objection the application is refused. (3.) No compensation shall be payable to any person by reason of the refusal of the Bench to grant any application."

Part V. of the Act provides for the limitation of the number

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of licences by what is called a Local Option Poll. Under Division I. of this part of the Act each electoral district for the House of Assembly is constituted a Local Option district, or may be divided by the Governor into several Local Option districts (s. 177). A quorum of electors in any Local Option district, i.e., five hundred of such electors or one-tenth of the total number, may petition for a Local Option Poll to be taken in the district (s. 178); and thereupon a poll is taken of all the electors resident in the district, the resolutions submitted at the poll being as follows: (1.) That the number of licences be reduced. (2.) That the number of licences be not increased or reduced. (3.) That the Licensing Bench may in their discretion increase the number of licences (s. 183).

If the first resolution is passed, it is taken to mean that the number of licences of each class current within the district shall be reduced by one-third, any fraction being disregarded (s. 183). Each elector may record only one vote on his ballot paper (s. 184). If the votes recorded in favour of the first resolution do not constitute a majority of the valid votes recorded at the poll, the votes recorded in favour of that resolution are to be added to the votes recorded in favour of the second resolution; and if the sum of the votes thus found in favour of the second resolution does not constitute a majority of the valid votes recorded at the poll, then the third resolution is to be adopted (s. 185).

In Division II. of Part V. provision is made for the enforcing of the first resolution. If that resolution is adopted, a Special Bench is to be constituted for the purpose of determining which of the licences in each class shall not be renewed after the expiration of the year for which they were granted (ss. 191–198), and the Licensing Court is required at its next annual meeting to reduce the number of licences by not renewing any of the licences so selected by the Special Bench; but it is expressly provided that the Licensing Court shall not, whilst the resolution continues in force, be bound to grant the full number of licences so reduced, and that its discretion shall in other respects continue as before the Local Option Poll.

Division III. of Part V. is headed "Effect of other Resolu-

tions," and consists of two sections. Sect. 200, which deals with the effect of the adoption of the second resolution, is as follows: "If the second resolution is adopted at a Local Option Poll in any Local Option District, no licence of any class shall thereafter, whilst such resolution continues in force, be granted in such district, except in respect of premises licensed at the time of such poll or premises to which a licence existing within such district at such time is removed."

Sect. 201 provides that, if the third resolution is adopted, new licences may be granted in the discretion of the Licensing Court, but not so as to exceed in number one-third of the existing number of licences. A resolution adopted at a Local Option Poll is to continue in force until altered or rescinded by a resolution adopted at a subsequent Local Option Poll (s. 203).

The above appear to be all the sections of the Act which are material for the purposes of this case.

The licensing district of Adelaide was duly constituted under the Act, and became a Local Option district. On April 2, 1910, a Local Option Poll of the electors of the Local Option District of Adelaide was taken pursuant to Part V. of the Act, and resulted in the adoption of the second resolution above referred to, namely, that the number of licences be not increased or reduced.

On November 27, 1916, the appellant, William Thomas White, who since May 4, 1914, had been the holder of a publican's licence for the "Adelaide Hotel," duly made application for a renewal of that licence at the next annual meeting of the Licensing Court. On February 5, 1917, Thomas Henry Davey, Chief Inspector of licensed premises for the district, gave notice of objection to the renewal of this licence, on the ground that the licensing of the premises was not required for the accommodation of the public. On March 7, 1917, the application came on for hearing at the Licensing Court, and thereupon counsel for the applicant submitted that, in view of the decision on the Local Option Poll "that the number of licences be not increased or reduced," the Court had no jurisdiction to entertain the objection of Thomas Henry Davey, or to refuse to renew the licence on the ground

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of redundancy. After argument this contention was rejected by the Licensing Court, who held that the whole effect of the second resolution is set out in s. 200, and accordingly that the passing of that resolution, while it abrogates the power of the Court to grant new licences, has no effect on the absolute discretion to refuse an application for the renewal of an existing licence conferred upon the Court by s. 59 of the Act. The Court accordingly held that they had jurisdiction to consider the objection, and being of opinion that the objector had made out a case, called upon the applicant to show cause why his application should not be refused.

Upon this decision being given, the applicant applied to the Supreme Court of South Australia for a writ of prohibition, and upon this application an order nisi was made on May 15, 1917, and was made absolute an August 14, 1917. The decision of the Supreme Court, which represented the opinion of the majority of the Court (the Chief Justice and Buchanan J., Gordon J. dissenting), was based upon the view that effect must be given to the express direction in the second resolution that the number of licences be not reduced, and that s. 200 is inserted ex abundanti cautela, and in order to make it clear that a new licence is not to be granted in exchange for an existing licence. Against this decision an appeal was brought to the High Court of Australia, which on February 27, 1918, unanimously allowed the appeal and discharged the writ of prohibition. Against this decision the present appeal is brought.

The real question for decision is whether the effect of the passing of the second resolution on the Local Option Poll was to take away the absolute discretion given to the Licensing Court by s. 59 of the Act of 1908 to refuse renewals of licences within the district. The appellant contends that the resolution had that effect, and relies upon the form of the resolution passed at the poll, namely, that the number of licences be not increased or reduced. But it is important to notice that Division I. of Part V. of the Act, while it provides for the passing of one or other of the three resolutions, contains no provisions which give to a resolution when passed any

inding effect. In order to ascertain the legal effect of any of the resolutions it is necessary to turn to Divisions II. and III. of Part V.; and when this is done, it is found that the only effect thus given to the second resolution is that described in s. 200, namely, that the grant of new licences in the district is thereby forbidden. It is argued that the resolution may have effect independently of s. 200, and must be taken to mean what it says, namely, that the number of licences shall not be reduced; but the answer is that none of the resolutions set out in s. 183 means exactly what it says, or can be understood without reference to the later sections of the Act. Resolution 1, which in form provides only for some reduction in the number of licences, and might be satisfied (so far as its terms go) by the refusal to renew a single licence, is explained by the later provisions of the Act as meaning that the number is to be reduced by one-third, and that this reduction is to be effected by the special means fully described in Division II. of this part of the Act. Again, resolution 3, which in terms provides that the Court may in their discretion increase the number of licences and imposes no limit on such increase, is found on reference to s. 201 to involve a limitation of the permitted increase to one-third of the existing number of licences. In view of these considerations it would be improper to rely entirely upon the form of any particular resolution as evidencing its effect, and regard must be had to the manner in which each resolution is worked out by the later sections of the Act.

There is a further difficulty in the way of the appellant. If resolution 2 is to be taken as meaning what it says, then it prevents the justices from refusing a renewal, not only on the ground of redundancy, but also on any of the other grounds above described, such as the bad character of the applicant or the bad conduct or structure of the licensed premises; for a refusal to renew on any of these grounds would equally have the effect of reducing the number of licences. In that case the effect of passing the resolution is to give security of tenure to an unsuitable or even to a criminal licensee, and to premises in no way adapted for carrying on a publican's business.

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Counsel for the appellant, no doubt seeing the difficulty of maintaining that the Act must be construed so as to have this effect, contended that the passing of resolution 2 only prevents the refusal of a renewal on the ground of redundancy; but redundancy is classed in s. 47 of the Act with the other grounds of objection, and no warrant is to be found for reading "reduced" in the resolution as meaning only "reduced on the ground of redundancy." It would be a strange result of the Act if the passing of resolution 2, for which, if resolution 1 is not passed, the supporters of that resolution are deemed to have voted, should be to destroy the discretion of the justices and give full security of tenure to the existing licence-holders.

It is said that, if the view of the High Court is correct, the words "or reduced" in resolution 2 have no meaning; but it appears to their Lordships that these words may fairly be held to refer to a compulsory reduction such as is described in resolution 1 and in the sections explaining that resolution. In other words, the electors, by passing resolution 2, decide that the number of licences is not to be compulsorily reduced by one-third, but is not to be increased.

Upon a consideration of all the provisions of the Act, their Lordships have arrived at the conclusion that this is the meaning and effect of the resolution, and accordingly that the decision of the High Court is right, and that this appeal should be dismissed with costs, and they will humbly so advise His Majesty.

Their Lordships cannot part with this appeal without adding that, while the effect of the second resolution may be ascertained by a careful consideration of the provisions of the Act, the form of the resolution renders it liable to be misunderstood by the electors who are asked to vote upon it without having the statute before them; and if an amendment of the statute should be in contemplation, it might be well to add to the form of ballot paper short explanations as to the effect of each resolution such as are contained in the form of voting paper scheduled to the Temperance (Scotland) Act, 1913, 3 & 4 Geo. 5, c. 33, Imp.

Solicitors for appellant: *Burton, Yeates & Hart.*

Solicitors for respondent: *Sutton, Ommaney & Oliver.*

[PRIVY COUNCIL.]

J. C.*
1919
July 3.

In re THE INITIATIVE AND REFERENDUM ACT.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA.

Canada (Manitoba)—Legislative Power—Constitution of Province—Office of Lieutenant-Governor—Initiative and Referendum Act (6 *Geo.* 5, *c.* 59, *Manitoba*)—*Invalidity—Colonial Laws Validity Act*, 1865 (28 *&* 29 *Vict. c.* 63), *s.* 2—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 92, *head* 1.

The British North America Act, 1867, s. 92, head 1, which empowers a Provincial Legislature to amend the constitution of the Province, "excepting as regards the office of Lieutenant-Governor," excludes the making of a law which abrogates any power which the Crown possesses through the Lieutenant-Governor who directly represents the Crown.

The Initiative and Referendum Act, being 6 Geo. 5 c. 59 of the Acts of the Legislative Assembly of Manitoba, is invalid, since it would compel the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the legislature of which he is the constitutional head, and would render him powerless to prevent it from becoming an actual law if approved by those voters. The offending provisions of the Act being so interwoven with its scheme as not to be severable, the Colonial Laws Validity Act, 1865, cannot be applied to validate any part of the Act.

Judgment of the Court of Appeal affirmed.

APPEAL by special leave from a judgment of the Court of Appeal of Manitoba (December 20, 1916).

By an Order in Council made on August 22, 1916, in pursuance of R. S. Man. 1913, c. 38, the following questions were referred by the Lieutenant-Governor in Council to the Court of King's Bench of Manitoba for hearing and consideration—namely, (1.) Had the Legislative Assembly jurisdiction to enact the Initiative and Referendum Act, and, if not, in what particular or respect has it exceeded its powers? (2.) Had the Legislative Assembly jurisdiction to enact ss. 3, 4, 4A, 7, 8, 11, 12, 17 (sub-s. 1), of said Act, or any of them; and, if so, which of them?

The Act referred to was 6 Geo. 5 c. 59 of the Legislative

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SCOTT-DICKSON.

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Assembly of Manitoba, and provided that laws might be made and repealed by the direct vote of the electors of the province at large. The provisions by which the Act proposed to carry out that object are summarized in the judgment of their Lordships; ss. 7 and 11 are set out in the footnote. (1)

On the matter coming on for hearing before Mathers C.J., counsel having consented that the said questions should be answered without argument, judgment was given on October 27, 1916, declaring that the Legislative Assembly had jurisdiction to enact the said Acts and the sections in question.

The appeal was argued in the Court of Appeal before Howell C.J., and Richards, Perdue, Cameron and Haggart JJ.A., and judgment was given on December 20, 1916, allowing the appeal and answering the questions submitted as follows: "To the first question, No. The particulars in which the Legislative Assembly exceeded its powers are set forth in the several reasons for judgment delivered by members of the Court and forwarded herewith. To the second question, as to ss. 3, 4, 4A, 7, 9, and 11, the answer is 'No.' As to s. 12 and s. 17 (sub-s. 1) the answer is: 'Taken with their context, No.'"

The reasons of the learned judges, which are fully reported at 27 Man. L. R. 1, may be shortly stated as follows. The British North America Act, 1867, declared that for each Province

(1) The Initiative and Referendum Act (6 Geo. 5), c. 59, Manitoba, s. 7: "A proposed law so referred to the electors and approved of by a majority of the votes polled thereon shall, unless a later date is specified therein, take effect and become law, subject, however, to the same powers of veto and disallowance as are provided in the British North America Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly, on a date to be fixed by proclamation to be made by the Lieutenant-Governor in Council, which date shall not be later than thirty days after the Clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote on said law in accordance with s. 35 hereof."

Sect. 11: "In the event of such Act or law or part or parts thereof not being approved of by a majority of the votes polled at such referendum, such Act or law or part or parts thereof so disapproved shall, at the end of 30 days, after the Clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote on such Act or law, or part or parts thereof, become and be deemed repealed."

there should be a Legislature, in which s. 92 vested the power of law-making; the Legislature could not confer that power upon a body other than itself. The procedure proposed by the Act in question would not be an Act of a Legislature within s. 92, would be wholly opposed to the spirit and principles of the Canadian constitution, and would override the Legislature thereby provided. Further, the power to amend the constitution given by s. 92, head 1, expressly excepted "the office of Lieutenant-Governor." Sect. 7 of the proposed Act, while preserving the power of veto and disallowance by the Governor-General provided for by ss. 55 and 90 of the Act of 1867, dispensed with the assent of the Lieutenant-Governor provided for by ss. 56 and 90 of that Act; even if s. 7 was not intended to dispense with that assent, s. 11 clearly did so. The proposed Act also violated the provisions of s. 54 (in conjunction with s. 90) as to money bills.

On the application of the Attorney-General of the Province special leave to appeal to His Majesty in Council was granted.

1919. May 15, 16. *Maugham K.C.* and *Horace Douglas* for the appellant. The Legislature of Manitoba had power to pass the Act now in question under s. 92, head 1 of the British North America Act, 1867. Upon the true construction of the Act the office or powers of the Lieutenant-Governor, as representing the Crown, are not interfered with. The Act should be construed ut valeat majus quam pereat. Although ss. 7 and 11 do not expressly reserve the discretionary power of the Lieutenant-Governor, they should be read as impliedly so doing. Sect. 4 (A) shows that it was not intended to enact anything which was ultra vires. If upon the necessary construction of any part of the Act the rights of the Lieutenant-Governor are interfered with, that part of the Act is severable and the residue is valid under s. 2 of the Colonial Laws Validity Act, 1865. There is no reason why the power given to the Legislature by s. 92, head 1 to amend the constitution should not be exercised by providing a different machinery for enacting laws, subject to the rights of the Crown. [Reference was made to *Hodge* v. *The Queen*. (1)]

(1) (1883) 9 App. Cas. 117.

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Sir John Simon K.C. and *Hon. M. Macnaghten K.C.* for the respondents, and, *Hon. F. Russell K.C.* and *T. Mathew* for the Attorney-General for Canada, were not called upon.

July 3. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case questions were raised in the province of Manitoba as to the validity of an Act passed by its Legislature and entitled the Initiative and Referendum Act. In consequence, under a statute which enabled him to do so, the Lieutenant-Governor in Council referred to the Court of King's Bench of the province the two questions which follow: 1. Had the Legislative Assembly jurisdiction to enact the said Act, and, if not, in what particular or respect has it exceeded its powers? 2. Had the Legislative Assembly jurisdiction to enact ss. 3, 4, 4A, 7, 8, 11, 12, 17, sub-s. 1, of the said Act, or any of them; and, if so, which of them?

On October 27, 1916, these questions came before Mathers C.J. By consent there was no argument, and the learned judge decided that the Legislative Assembly had jurisdiction to pass the Act and the several sections referred to in the second question.

The matter was then brought before the Court of Appeal of the province, and was argued before Howell C.J., and Richards, Perdue, Cameron and Haggart JJ.A. On December 20, 1916, the Court of Appeal delivered judgment, answering the questions submitted in the negative. The answer to the first question was: "No. The particulars in which the Legislative Assembly exceeded its powers are set forth in the several reasons for judgment delivered by members of the Court and forwarded herewith." The answer to the second question was: "As to ss. 3, 4, 4A, 7, 9 and 11 the answer is 'No.' As to s. 12 and s. 17, sub-s. 1, the answer is, 'Taken with their context, No.'"

In October, 1918, special leave was granted by His Majesty in Council to the Attorney-General of the province to appeal to the Sovereign in Council, and by Order dated November 25 in the same year leave was granted to the Attorney-General of Canada to intervene.

It would have been a convenient course if, before bringing these questions before the Sovereign in Council, the authorities of the province had seen their way in the first place to submit them for the opinion of the Supreme Court of Canada. It is desirable that topics affecting the Constitution of Canada should come before that Court before being brought to London for argument. However, the parties appear to have concurred in asking that special leave for a direct appeal should be granted. Their Lordships desire to observe that it is by no means a matter of course that such leave should be given, for they attach much importance, not only to the position which belongs to the Supreme Court under the Constitution of Canada, but to the value, in the decision of important points such as those before them, of the experience and learning of the judges of that Court. However, the Attorney-General of the province has succeeded in obtaining special leave to bring the case directly before the Judicial Committee, and their Lordships will therefore deal with it. They will only observe further at this stage that they have derived much assistance from the judgments delivered by the members of the Court of Appeal for Manitoba.

The validity of the Initiative and Referendum Act, a statute of a type which is not unknown in parts of the world with constitutions different from that of Canada, of course depends on whether the Constitution of Canada as defined by the British North America Act of 1867 permitted a Provincial Legislature to pass it into law for the Province. The first step in the consideration of the matter is therefore to ascertain the exact character of the legislation proposed. In substance it is this. The Legislative Assembly seeks to provide that laws for the Province may be made and repealed by the direct vote of the electors, instead of only by the Legislative Assembly whose members they elect. The machinery created for the accomplishment of this end is that first of all a number of the electors, being not less than eight per cent. of the number of votes polled at the last election, may by petition submit a proposed law to the Legislative Assembly. In the next place, the proposed law, unless enacted without substantial change

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by the Assembly in the session in which it is submitted, must be submitted by the Lieutenant-Governor in Council to a vote of the electors, to be taken at the next general Provincial election, unless a special referendum vote has been asked for in the petition. Provision is made for time being available in which to obtain the opinion of the Attorney-General, and if necessary of the Court, as to whether the proposed law is intra vires. If not it cannot be submitted. If a special referendum vote has been asked for it is usually to be taken within six months from the presentation of the petition. In the third place, if a proposed law has been submitted to the electors, and approved by a majority of the votes polled, it is to take effect, " subject, however, to the same powers of veto and disallowance as are provided in the British North America Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly," on a date to be proclaimed by the Lieutenant-Governor, and to be not later than thirty days after the official announcement of the result of the vote.

The proposed law further provides that a number of electors, equivalent in this case to not less than five per cent. of the number of votes polled at the last election, may petition for the repeal of any Act of the Assembly or of any law enacted by the new method, the validity of which is now in question, and provisions, not differing in material respects from these already referred to, are made for the repeal of such Act or law. There are in the Initiative and Referendum Act other provisions which may be mentioned briefly. No Act of the Legislative Assembly is to take effect until three months after the end of the session in which it was passed, unless in a preamble voted for by two-thirds of the members voting, the Act has been declared to be an emergency measure, but this is not to apply to a Supply Bill or Appropriation Act, except as to items for capital expenditure exceeding $100,000. When a vote is to be taken under the Act the Lieutenant-Governor is to order the issue of writs in His Majesty's name for taking such vote, and he is also to provide for the public dissemination of information and arguments on the

matters referred, not exceeding twelve hundred words for each side.

The framework of the Constitution of Canada was enacted in 1867 by the Imperial Parliament in order to give effect to the desire expressed in the Resolutions adopted by the Conference of Canadian and other delegates held at Quebec in October, 1864. The object was to form in the first instance out of the old Province of Canada, along with Nova Scotia and New Brunswick, a Dominion with a constitution similar in principle to that of the United Kingdom. Provision was made for the extension of this Constitution to other colonies, such as Newfoundland and Prince Edward Island, should they desire to come in, and also to Rupert's Land and the North-Western Territory. It is out of these last that the Province of Manitoba was formed, the provisions of the Act of 1867 that are applicable having been meantime strengthened by subsequent Imperial and Dominion legislation. The Executive Government of Canada was declared by the Act of 1867 to remain vested in the Queen, and, by s. 12, all powers, authorities and functions vested in or exercisable by the Governors or Lieutenant-Governors of the Provinces brought into confederation were, so far as the same continued in existence and were capable of being exercised after the Union in relation to the Government of Canada, to be vested in and exercisable by the Governor-General. A Parliament was then set up for Canada. Part V. of the Act established analogous Constitutions for the Provinces. For each of these there was to be a Lieutenant-Governor. Although he is under s. 58 appointed by the Governor-General, it has been settled by decisions of the Judicial Committee, such as that in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1), that, as the appointment of a Provincial Governor is made under the Great Seal of Canada, and therefore really by the Executive Government of the Dominion which is in the Sovereign, the Lieutenant-Governor is as much the representative of His Majesty for all purposes of Provincial Government as is the Governor-General for all purposes of

(1) [1892] A. C. 437.

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Dominion Government. Sect. 65 and the other sections dealing with the subject define the powers of the Lieutenant-Governor as being such of those powers having been exercisable by the Governors or Lieutenant-Governors of the Provinces brought into Confederation, as are exercisable in relation to the Government of a Province. The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.

The importance of bearing this in mind when construing the subsequent provisions of the British North America Act will presently appear. After thus defining the executive power the statute goes on to provide for a Legislature for each Province, and concludes Part V. by declaring in s. 90 that what has been laid down as to the Dominion Parliament in regard to Appropriation and Money Bills, the recommendation of money votes, the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, is to extend and apply to the Legislatures of the several Provinces as if these provisions were re-enacted and made applicable in terms to the respective Provinces and their Legislatures, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Sovereign and for a Secretary of State and of one year for two years, and of the Province for Canada.

The Act then, by two well-known sections, 91 and 92, distributes the powers of legislation which it confers between the

Dominion Parliament and the Provincial Legislatures. Nothing in s. 91, which relates to Dominion powers, affects the question under consideration, excepting in one important respect. The residuary power of legislation, beyond those powers that are specifically distributed by the two sections, is conferred on the Dominion. Had the Provinces possessed the residuary capacity, as in the case with the States under the Constitutions of the United States and Australia, this might have affected the question of the power of their Legislatures to set up new legislative bodies. But it is not so, and it is therefore unnecessary to pursue a point which is merely speculative. The language of s. 92 is important. That section commences by enacting that " in such Province the Legislature may exclusively make laws in relation to matters " coming within certain classes of subjects. The only one of these classes which is relevant for the present purpose is the first enumerated, " the amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, excepting as regards the office of Lieutenant-Governor."

The references their Lordships have already made to the character of the office of Lieutenant-Governor, and to his position as directly representing the Sovereign in the province, renders natural the exclusion of his office from the power conferred on the Provincial Legislature to amend the constitution of the Province. The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it. For when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the province, it is in contemplation of law the Sovereign that so gives or withholds assent. Moreover, in accordance with the analogy of the British Constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the Sovereign is a part of the Legislature. This is in terms so enacted in such sections as s. 69, the principle of which has been applied to Manitoba by s. 2 of the Dominion

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Statute of 1870, which formed the new Province out of Rupert's Land and the North Western Territory, and established it with the Constitution provided by the Act of 1867. It follows that if the Initiative and Referendum Act has purported to alter the position of the Lieutenant-Governor in these respects, this Act was in so far ultra vires.

Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the constitutional head, and renders him powerless to prevent it from becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in s. 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from Bills, and the powers of veto and disallowance referred to can only be those of the Governor-General under s. 90 of the Act of 1867, and not the powers of the Lieutenant-Governor, which are at an end when a Bill has become an Act. Sect. 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.

These considerations are sufficient to establish the ultra vires character of the Act. The offending provisions are in their Lordships' view so interwoven into the scheme that they are not severable. The Colonial Laws Validity Act,

1865 (1), therefore, which was invoked in the course of the argument, does not assist the appellants.

Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the Court below, to advert to it. Sect. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge* v. *The Queen* (2), the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

They have already indicated that on the point considered earlier in this judgment they are of opinion that the first part of the first question submitted for judicial decision, that relating to the jurisdiction to pass the Act, must be answered in the negative. As to the second part of this question and as to the second question submitted which covers the same ground, namely, whether the Legislative Assembly could enact ss. 3, 4, 4A, 7, 9, 11, 12 and 17 (sub-s. 1), or any of them, they agree with the Court of Appeal, subject to a reservation as to s. 12, in thinking that none of them were validly enacted, for they were merely steps towards the accomplishment of a purpose that was ultra vires. As to s. 12, if the last sentence were omitted they think that the main part of this might be made a subject of valid enactment. The earlier part of the section is severable, and if it had been capable of interpretation apart from the title of the Act and

(1) 23 & 29 Vict. c. 63. (2) 9 App. Cas. 117.

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its context, it could have been validly enacted. But it is obvious that this provision was introduced where it stands in the midst of a number of other sections as preparatory to the accomplishment of ultra vires purposes.

It may well be, therefore, that the Court of Appeal was right in refusing to look at it apart from the rest of the sections, the purposes of which it was put in to subserve. Their Lordships think it unnecessary to decide a point which the appellants did not raise as a separate one at the Bar, and which has no relation to the real topic of controversy, or to interfere with the conclusion come to by the judges in the court below.

They will humbly advise His Majesty that the questions submitted should be answered in the terms indicated. There will be no order as to costs. The appeal should be simply dismissed.

Solicitors for appellant : *Lawrence Jones & Co.*
Solicitors for respondents : *Blake & Redden.*
Solicitors for intervenant : *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1919
July 3.

EDGAR WALKER . . . . . APPELLANT;

AND

CATHERINE WALKER . . . . . RESPONDENT;

ATTORNEY-GENERAL FOR THE PROVINCE OF MANITOBA . . . INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA.

Canada (Manitoba)—Divorce—Jurisdiction—Court of King's Bench.

The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, Imp.) enacts a substantive law of divorce and matrimonial causes, which by virtue of 51 Vict. c. 33 (Dom.), s. 1, is in force in the province of Manitoba, and the Court of King's Bench of that province has jurisdiction to administer that law.

Watts v. *Watts* [1908] A. C. 573 applied.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal of Manitoba (April 15, 1918), reversing a judgment of the Court of King's Bench (May 17, 1917).

The respondent, Catherine Walker, petitioned the Court of King's Bench for the Province of Manitoba praying that her marriage with the appellant might be declared null and void on the ground of his impotency. The parties were domiciled in Manitoba.

Galt J., who heard the petition, found that the petitioner had made out a sufficient case for the annulment of her marriage under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, Imp.), and was entitled to a decree provided that that Act was in force in Manitoba, and provided that the Court had jurisdiction. Since the Court in Manitoba had not theretofore exercised any jurisdiction in divorce or matrimonial causes, the learned judge thought that if the jurisdiction existed it should be declared by the Court of Appeal. He accordingly dismissed the petition.

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SCOTT-DICKSON.

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Upon an appeal to the Court of Appeal the Attorney-General for Manitoba intervened.

The Court of Appeal unanimously reversed the judgment of Galt J. and remitted the petition to be heard and disposed upon the evidence already adduced and such further evidence as might be offered.

The learned judges held that the Court of King's Bench for Manitoba had by virtue of s. 1 of 51 Vict. c. 33 (Dom.) and s. 10 of the King's Bench Act (R. S. Man., 1913, c. 46), if not by enactments of the Council of Assiniboia prior to the admission of Rupert's Land into the Dominion, the same jurisdiction to deal with matrimonial causes as the Courts have in England under the Matrimonial Causes Act, 1857. The appeal is reported at 28 Man. L. R. 495.

The Court of Appeal gave leave to appeal to His Majesty in Council.

1919. May 12, 13. *Maugham K.C.* and *Horace Douglas* for the appellant. This case is distinguishable from *Watts* v. *Watts*. (1) When that decision was given divorces had been granted in British Columbia for many years; grave results would have followed from a decision that the Courts had no jurisdiction. In Manitoba, on the other hand, the Courts have never entertained matrimonial causes; further, the legislation upon which the jurisdiction of the Courts depends is different. The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, Imp.), does not form part of the law of Manitoba. The laws in force in Rupert's Land and the North-West Territories, by virtue of 1 & 2 Geo. 4, c. 66 (Imp.), s. 6, were (except as to land) the laws in force in Upper Canada. Upon the creation of the province of Manitoba and its admission to the Union, s. 2 of 33 Vict. c. 3 (Dom.), validated by the Imperial statute 34 & 35 Vict. c. 28, s. 5, brought into force s. 129 of the British North America Act, 1867 (30 & 31 Vict. c. 3, Imp.), and continued in Manitoba the laws previously in force—namely, those of Upper Canada. There was in Upper Canada no law of divorce, but only a power in the Court of Chancery to grant alimony under

(1) [1908] A. C. 573.

Cons. Stat. U. C., 1859, c. 12, s. 29. The Dominion statute of 1888, 51 Vict. c. 33, had not the power, and cannot have been intended, to declare that the laws of England, more especially the laws relating to divorce, had been in force since July 15, 1870. It must therefore be given a restricted effect. That statute was enacted in consequence of the erroneous decision in *Sinclair* v. *Mulligan* (1); and, as is stated in the preamble, was passed "for the removal of doubts." There was no doubt whether there was any law of divorce in the Province. Had an alteration of the law so important as that contended for been intended the statute would have enacted it in specific terms. The Parliament of Canada has consistently refused to delegate to the Courts of Justice its powers to grant divorces: see Gemmill on Divorce (Toronto, 1889), and Lefroy's Canada's Federal System, p. 147. Further, whether or not the English statute of 1857 forms part of the law of Manitoba, the Court of King's Bench has no jurisdiction to grant a divorce. The statute creating the Supreme Court (now the Court of King's Bench), namely, 34 Vict. c. 2 (Man.), and later statutes including R. S. Man., 1913, c. 46, defining the jurisdiction of that Court, while specifying the matters in which jurisdiction is conferred do not mention divorce. The statutes from 38 Vict. c. 12 (Man.), onwards, including the Act of 1913, confined the jurisdiction to matters "relative to property and civil rights." Those words refer to the provincial legislative power under s. 92, head 13, of the British North America Act, 1867, and consequently exclude "marriage and divorce," a legislative subject confided to the Dominion by s. 9, head 26. [Reference was also made to the Charter of the Hudson Bay Co. of July 15, 1870; to the Imperial Acts, 3 & 4 Vict. c. 35 (uniting Upper and Lower Canada); the Rupert's Land Act (31 & 32 Vict. c. 105); 32 & 33 Vict. c. 3; to 33 Vict. c. 3 (Can.); the Ordinances of Assiniboia (No. 53 of 1862 and T. of 1864); and to *M, falsely called S. V. S.* (2); *Scott* v. *Scott* (3); *Sheppard* v. *Sheppard*. (4)]

(1) (1887) 3 Man. L. R. (Q. B.) 481.

(2) (1877) 1 Brit. Col. Rep., Part I., 25.

(3) (1891) 4 Brit. Col. Rep. 316.

(4) (1908) 13 Brit. Col. Rep. 486.

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Sir John Simon K.C. and *Hon. M. Macnaghten K.C.* for the respondent, and, *John Allen* for the Attorney-General for Manitoba, intervenant, were not called upon.

July 3. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The question to be decided in this case is one of much importance, and is of a class as to which their Lordships always desire that, before any topic falling within it is brought before them on appeal, that topic should have previously been submitted for consideration by the Supreme Court of Canada. However, in bringing the appeal directly from the Court of Appeal in the Province, the appellant is within his legal right, and it becomes the duty of this Board to dispose of the question raised.

That question is whether the Court of King's Bench for the province of Manitoba has jurisdiction to deal with a petition for a decree declaring a marriage null and void on the ground of impotency. The answer to this question depends on what is the law relating to dissolution of marriage in the Province, and to the jurisdiction of its Court of King's Bench.

It will be convenient in the first place to refer briefly to the history of the territory of the Province. Originally, what is now Manitoba formed part of so much of what is to-day the territory of Canada as had been included by King Charles II. in the Charter which he granted in 1670 to the Hudson's Bay Co. The area comprised in this Charter was treated as extending to what became known later as Rupert's Land and the North-Western Territory. When the Dominion of Canada was formed in 1867 the Hudson's Bay Company's territory was not brought within it. Its inclusion, at all events partially, was however rendered practicable by subsequent legislation. In particular by s. 146 of the British North America Act of 1867, it had been provided that the Sovereign in Council might, on Address from the Dominion Parliament, admit Rupert's Land and the North-Western Territory into the Union on terms and conditions to be set out in the Address and approved by the Sovereign. By Order in Council of June 23, 1870, Rupert's Land and

the North-Western Territory were admitted accordingly into the Dominion. The terms and conditions are not important for the present question.

Before referring to the steps which were taken to form what became the province of Manitoba, after this admission, it is important to see what was the state of the law in Rupert's Land and the North-Western Territory at the time when the admission took place. The Charter of 1670 enabled the Hudson's Bay Co. to make laws and administer justice in the region confided to them. There is no doubt that the settlers brought with them to that region such of the laws of England in 1670 as were applicable under the circumstances. In course of time Imperial legislation took place, designed apparently for the protection of those living within Indian territories and other parts of America outside Upper and Lower Canada and the civil government of the United States, legislation long prior to Confederation, and which gave jurisdiction to the Courts of Upper Canada to entertain suits arising outside Upper Canada, but within these regions, and to deal with the subject-matter as if (with certain exceptions) the law of Upper Canada applied. Their Lordships do not think that the provisions so made took away the general power to make laws and set up Courts conferred by the Charter of 1670 on the company.

What afterwards became the limits of the Province of Manitoba included a part of Rupert's Land called the District of Assiniboia. For this district the company had set up a Governor and Council, who acted as a Court of Justice. At a meeting of this body in 1851 an Ordinance was passed providing that, in place of the laws of England as they were at the date of the original Charter of 1670, these laws as they had become at the date of the accession of Queen Victoria should regulate the proceedings of the Court. In 1864 there was substituted for the laws at the date of the Queen's accession "all such laws of England of subsequent date as may be applicable."

Whatever relevance these steps in legislation might possess were the answer to the present question dependent on how far

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the law of England, as it stood at the time of Confederation, was applicable in Manitoba or in part of it, the point becomes unimportant in view of what followed after Confederation. For the Dominion Parliament in the first place passed an Act in 1869 (1) which provided ad interim that all the laws which should be in force in Rupert's Land and in the North-Western Territory at the time of their admission, which was then likely to take place, should, so far as consistent with the British North America Act, 1867, remain in force until altered. Shortly after this, in 1870, the Dominion Parliament passed a second Act (2) by which the Province of Manitoba was formed out of Rupert's Land and the North-Western Territory, and the provisions of the British North America Act (except those parts which were inapplicable to the Provinces generally then composing the Dominion) were made to apply to the new Province of Manitoba in the same way and to the like extent as if this Province had been originally included at Confederation, with provisions for the representation of Manitoba in the Dominion Parliament and for the establishment of a Legislature in the Province. In order to get rid of doubts as to the power of the Dominion Parliament to enact these statutes an Imperial Act was passed in 1871 (3), which confirmed them as from the dates at which the Governor-General assented to them in the Queen's name, and provided generally that the Dominion Parliament should have power to establish new Provinces in territory within the Dominion but not included in any of its existing Provinces, and to make provision for administration and for the peace, order and good government of any such Provinces, and for any territory not for the time being included in any Province.

The most important of these statutes for the purposes of the present question is the second of the Dominion Acts, that of 1870, providing for the formation and government of Manitoba, and confirmed as from its date by the Imperial Act of 1871. By s. 2 of this Dominion Act it had been enacted, as their Lordships have already stated, that the provisions

(1) 32 & 33 Vict. c. 3. (2) 33 Vict. c. 3.
(3) 34 & 35 Vict. c. 28.

of the British North America Act, 1867 (excepting those not applicable to the whole of the Provinces of the Dominion), should apply to the new Province of Manitoba. The effect of this was that the Legislature of the Province was enabled, when set up, to pass an Act in 1871 (1) establishing a Supreme Court with jurisdiction over all matters of law and equity. As far as possible, consistently with the circumstances of the country, the laws of evidence and the principles which governed the administration of justice in England were to obtain in this Supreme Court of Manitoba. Moreover by s. 52, so much of the laws of the Governor and Council of Assiniboia as were not inconsistent with the Act were to be extended to the whole of the province of Manitoba.

It may be that the effect of the amending Ordinance already referred to, passed by the Council of Assiniboia and declaring that the laws of England not only down to but subsequent to Queen Victoria's accession were to regulate the proceedings of the General Court, taken together with the statutes just referred to, and with s. 52 of the Manitoba Act of 1871, were sufficient to make all existing English law, except so far as inapplicable, extend to the new Province. But their Lordships are of opinion that it is unnecessary to consider this point, in view of the provision made by an Act of the Dominion Parliament passed in 1888 (2) to remove doubts as to the application of certain laws to the province of Manitoba. This Act, if it extended to the subject of marriage and divorce, was, in so far as it did so, plainly within the exclusive power of legislation conferred on the Dominion Parliament by s. 91 of the British North America Act, 1867. It provided by s. 1 that, with an exception that is not material, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, so far as the same existed on July 15, 1870, had been, as from that date, and were in force in Manitoba, in so far applicable to the province and unrepealed by Imperial or Dominion legislation.

In the case of *Watts* v. *Watts* (3) it was decided by this

(1) 34 Vict. c .2 (amended by 35 Vict. cc. 3 and 4).

(2) 51 Vict. c. 33.

(3) [1908] A. C. 573.

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Board that legislation in British Columbia, whereby it was declared that "the civil and criminal laws of England as the same existed on November 19, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force," was sufficient to make the provisions of the English Matrimonial Causes Act of 1857 apply so far at least as to enable the Court of British Columbia to grant divorce for adultery. Even if their Lordships were disposed to treat this decision as not binding on them, they see no reason to dissent from it, or to doubt the application mutatis mutandis of its principle to the present case. For the Matrimonial Causes Act, 1857, did much more than set up a new Court and regulate its procedure. It introduced new substantive law, and gave to the Court it constituted not only the jurisdiction over matrimonial questions which the old ecclesiastical tribunals possessed, but a new jurisdiction, arising out of the principle, then for the first time introduced into the law of England, of the right to divorce a vinculo matrimonii for certain matrimonial offences. This right had thus been made part of the law of England by July 15, 1870, and their Lordships are of opinion that it became part of the substantive law of Manitoba. The circumstance that Ontario has no such law as to divorce does not appear to their Lordships to militate against this construction of the Dominion Act in question.

A further point has however been raised by the appellant. It is that the Dominion Parliament, even assuming that it introduced new substantive law on the subject, had committed no jurisdiction to the Courts of Manitoba to apply that law, and that the Legislature of Manitoba had not, when constituting its Supreme Court, endowed it with power to do so. It is sufficient that their Lordships should point out that in 1913, prior to the proceedings in the present case, the King's Bench Act of that year passed by the Legislature of the province had provided that the Court of King's Bench, which had taken the place of the former Supreme Court, was to be a Court of Record of original jurisdiction, and to possess and exercise all such powers and authorities as by the laws of England are incident to a Superior Court of Record of civil and criminal jurisdiction in

all matters civil and criminal whatsoever, and was to possess all the rights and privileges of such Courts, as fully as the same were on July 15, 1870, possessed by any of her late Majesty's Superior Courts of Common Law at Westminster or by the Court of Chancery at Lincoln's Inn, or by the Court of Probate, or by any other Court in England having cognisance of property and civil rights and of crimes and offences. The Act goes on to direct the Court to hold plea in all manner of actions, suits and proceedings, whether at law or in equity or probate or howsoever otherwise.

Their Lordships find nothing in the context of the Act to limit the natural meaning of these words, and they are therefore of opinion that the case is indistinguishable from what was decided in *Watts* v. *Watts* (1) by this Board. It appears to them to be clear that, in the absence of words limiting its jurisdiction under the Act referred to, the Court of King's Bench of the province of Manitoba was rightly held by the learned judges in the Court of Appeal of the Province, as the result of the careful and learned judgments they delivered, to have had jurisdiction, as contended by the respondent and the intervenant.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. It has been agreed that nothing should be said about costs.

Solicitors for appellant: *Lawrence Jones & Co.*

Solicitors for respondent and intervenant: *Blake & Redden.*

(1) [1908] A. C. 573.

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[PRIVY COUNCIL.]

MARY BOARD . . . . . *Appellant;*

AND

WILLIAM BOARD . . . . . *Respondent.*

ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA . . . . . *Intervenant.*

ON APPEAL FROM THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION).

Canada (Alberta)—Divorce—Jurisdiction—Supreme Court.

The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, Imp.), enacts a substantive law of divorce and matrimonial causes, which by virtue of 49 Vict. c. 25 (Dom.) s. 3, is in force in the Province of Alberta, and the Supreme Court of that Province has jurisdiction to administer that law.

Judgment of Supreme Court affirmed.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division (June 26, 1918).

The respondent, William Board, presented a petition to the Supreme Court of the Province of Alberta praying for a decree for the dissolution of his marriage with the appellant on the ground of her adultery. The parties were domiciled in the Province.

The appellant applied by motion for an order dismissing the petition on the ground that the Court had no jurisdiction in the matter. The motion was referred to the Appellate Division, and the Attorney-General for Alberta intervened.

The Appellate Division (Harvey C.J. dissenting) dismissed the motion and remitted the petition for hearing.

The majority of the Court held that the substantive law enacted by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, Imp.), was in force in the Province, having been introduced into the territories out of which the Province was

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SCOTT-DICKSON.

formed by 49 Vict. c. 25, Dom., and continued in force by 4 & 5 Edw. 7, c. 3; and that the Supreme Court, being a superior Court of record, had the necessary jurisdiction to administer the law so introduced. The appeal is reported at 13 Alb. L. R. 362. The Court gave leave to appeal to His Majesty in Council.

1919. May 13, 15. *Maugham K.C.* and *Horace Douglas* for the appellant. (1) The Dominion statute 49 Vict. c. 25 did not introduce into the North-West Territories the English law of Divorce and Matrimonial Causes. This case differs from *Walker* v. *Walker* (2) in that the above Act, which by s. 3 provides what law is to be administered, itself constitutes the Court to administer the law so introduced and defines its jurisdiction. By s. 14 no reference is made to the Court for Divorce and Matrimonial Causes established by s. 6 of the Matrimonial Causes Act, 1857, in England, although all other Courts are enumerated. The Court established was to have the powers incident to a "Superior Court" in England. That expression does not include jurisdiction in matrimonial causes: *James* v. *South-Western Ry. Co.* (3); Halsbury's Laws of England vol. ix., p. 11. Since the Act gave no jurisdiction to the Court in Matrimonial Causes, it is to be inferred that the English law of divorce was not intended to be introduced. Further, the Supreme Court Act (7 Edw. 7, c. 3, Alb.), s. 9, in defining the jurisdiction of the Supreme Court, enacts that it shall have the jurisdiction which on July 15, 1870, was vested in enumerated English Courts. This enumeration follows that contained in s. 3 of the Judicature Act, 1873 (36 & 37 Vict. c. 66, Imp.), save that it omits "the Court for Divorce and Matrimonial Causes." This omission must have been intentional, and the only possible inference is that no jurisdiction in matrimonial causes was conferred. Heretofore, no Court in Alberta has ever purported to exercise any jurisdiction in those matters.

(1) The argument was heard continuously with that in *Walker* v. *Walker* (supra), of which part was applicable to this case.

(2) Supra, p. 947.

(3) (1872) L. R. 7 Ex. 287.

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Sir John Simon K.C. and *Hon. M. Macnaghten K.C.* for the respondent were not called upon.

July 3. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Alberta, by which it was held that there was jurisdiction in the Court to entertain proceedings on a petition for divorce on the ground of adultery.

The Province was established in 1905 by a Dominion Act of that year (1), being formed out of the North-West Territories. By s. 16 of the Act it was provided that the laws previously in force in the North-West Territories included in the new Province should continue subject to certain reservations which are not material. No law relating to marriage or divorce has been enacted by the Dominion Parliament since the Province was established, and it is therefore necessary to ascertain what was the law relating to marriage and divorce in the territories before the Province was constituted.

In the appeal, immediately previous to this one, of *Walker* v. *Walker* (2), their Lordships have referred to the legislation by which the Parliament of the Dominion acquired power to make laws relating to the North-West Territories. In 1886, the Dominion Parliament passed, under the powers it had so acquired, an Act to amend the law respecting them (49 Vict. c. 25). By s. 2 of that Act, all its statutes which were not inapplicable were to be in force in the territories, and by s. 3 the laws of England relating to civil and criminal matters, as the same existed on July 15, 1870, were to be in force in the territories, in so far as the same were applicable, unless excluded by Imperial or Dominion statute, or by ordinance of the Lieut.-Governor in Council.

For the reasons given in their judgment in *Walker* v. *Walker* (2) their Lordships are of opinion that the effect of the Act of 1886 was to make the English law of divorce as established by the Matrimonial Causes Act of 1857 apply to the territories as well as to Alberta.

But there is another question which has been raised in this

(1) 4 & 5 Edw. 7, c. 3. (2) Supra, p. 947.

appeal, which is whether the Supreme Court of the Province of Alberta has been so constituted as to have jurisdiction in matrimonial causes, including divorce.

The Dominion Act of 1886 (49 Vict. c. 25), by s. 4, established in the territories a Supreme Court of record of original and appellate jurisdiction, called the Supreme Court of the North-West Territories. By s. 14, this Court was, for the administration of the laws within them, to possess all such powers and authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction, and was to have and exercise all the rights, incidents and privileges of a Court of record, and all other rights, incidents and privileges, as fully to all intents and purposes as the same were on July 15, 1870, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law, or by the Court of Chancery, or by the Court of Probate in England, and was to hold pleas in all, and all manner of actions causes and suits, as well criminal and civil real and personal and mixed, and was to proceed in such actions, causes and suits by such process and course as are provided by law, and as should tend with justice and despatch to determine the same, and should hear and determine all issues of law, and should hear and (with or without a jury as provided by law) determine all issues of fact that might be found, and give judgment and award execution, in as full and ample a manner as might at the date mentioned be done in Her Majesty's Courts of Queen's Bench, Common Bench, or, in matters which regarded the Queen's Revenue (including the condemnation of contraband and smuggled goods), by the Court of Exchequer, or by the Court of Chancery or the Court of Probate in England.

It will be observed that in the above enumeration of Courts the Court of Divorce and Matrimonial Causes, established by the English Matrimonial Causes Act of 1857, is not mentioned.

By s. 91 of the British North America Act, 1867, the subjects of marriage and divorce are among the matters as to which the Dominion Parliament has exclusive jurisdiction. It has never passed any general Act relating to divorce, but it is obvious

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that it had power to, and did establish the substantive right to divorce in the territories, if the general words of s. 3 of its Act of 1886, putting into force there the law of England as it was on July 15, 1870, were wide enough to cover this subject. Their Lordships have already intimated that they are of opinion that these general words had this effect.

Under s. 92 of the British North America Act, 1867, the administration of justice, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these Courts, belongs exclusively to the Provincial Legislatures. Acting under this power, the Legislature of Alberta in 1907 passed a Supreme Court Act (1), establishing a Supreme Court of Alberta as a Superior Court of Civil and Criminal jurisdiction in, and for the Province. By s. 9 of that Act, it was provided that this Court should, within the Province, and for the administration of the laws for the time being in force within it, in addition to any other jurisdiction which before the Act was vested in, or capable of being exercised within the Province by the Supreme Court of the territories out of which it had been carved, possess the jurisdiction which on July 15, 1870, was vested in, or capable of being exercised in England by (1.) the High Court of Chancery, as a Common Law Court, as well as a Court of Equity, including the jurisdiction of the Master of the Rolls as a judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law Court; (2.) The Court of Queen's Bench; (3.) The Court of Common Pleas at Westminster; (4.) The Court of Exchequer as a Court of Revenue as well as a Common Law Court; (5.) The Court of Probate; (6.) The Court created by Commissioners of Oyer and Terminer, and of Gaol Delivery, or of any of such Commissions.

Sect. 9 of this Supreme Court Act of 1907 further provided that the jurisdiction aforesaid should include the jurisdiction which, at the commencement of the Act, was vested in or capable of being exercised by all or any one or more of the

(1) 7 Edw. 7, c. 3.

judges of the said Courts respectively, sitting in court or chambers or elsewhere, when acting as judges or a judge in pursuance of any statute, law or custom; and all powers given to any such Court or to any such judges by any statute; and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction so conferred.

It will be observed that in the above enumeration of Courts, the Court for Divorce and Matrimonial Causes, set up by the (English) Matrimonial Causes Act of 1857, is again omitted.

Turning to this English statute, their Lordships observe that its effect is as follows: It transfers to a new statutory Court which it sets up all the jurisdiction of the existing Ecclesiastical Court (which did not extend to divorce a vinculo matrimonii for adultery, but did comprehend divorce a mensa et thoro and lesser matters). This new Court was to be called the Court for Divorce and Matrimonial Causes, and was to sit in London or Middlesex. The right was given to present a petition for dissolution of marriage, for adultery, and for certain other causes, and the decree might include not only such dissolution, but damages as at common law. As regards the composition of the new Court, it was to consist of the Lord Chancellor, the Lord Chief Justices of the Queen's Bench and Common Pleas, the Lord Chief Baron of the Exchequer, the senior Puisne Judge in each of those Courts, and the judge of the Court of Probate, then about to be established. The last-named judge was to be the Judge Ordinary of the new Matrimonial Court, and was to exercise all its ordinary jurisdiction except trials of petitions for nullity of marriage and divorce, and applications for new trials. During his temporary absence the Lord Chancellor was empowered to authorize the Master of the Rolls, the judge of the Admiralty Court, either of the Lords Justices, or any Vice-Chancellor, or any judge of the Superior Courts of Law at Westminster, to act as Judge Ordinary of the new Court, and to exercise all the jurisdiction of the Judge Ordinary. The Matrimonial Causes Act of 1857 was amended by a further Act in 1859, under which all the judges of the three Common Law Courts were to be judges of the new Divorce Court.

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Their Lordships think that the way in which the Act of 1857, as it stood originally unaltered by subsequent legislation such as the Judicature Acts, constituted the existing judges of other Courts judges of the new Court detracts from the weight of any inference based on the omission of a reference to it in the Acts setting up the Supreme Courts of the North-West Territories and of Alberta. Had it been intended to exclude jurisdiction in divorce it would have been necessary to say so; for the language of s. 9 of the Act of 1907 in particular is so comprehensive that it confers on the Supreme Court of Alberta all the capacity given by the Divorce Acts to the judges of the other Courts in England to act as the Court established by those Acts. Their Lordships would arrive at this conclusion even if the words "at the commencement of this Act" in s. 9 of the Act of 1907 were treated as rendered nugatory by the changes effected by the English Judicature Act.

But the matter does not rest here. The right to divorce had, before the setting up of a supreme and superior Court of record in Alberta, been introduced into the substantive law of the Province. Their Lordships are of opinion that, in the absence of any explicit and valid legislative declaration that the Court was not to exercise jurisdiction in divorce, that Court was bound to entertain and to give effect to proceedings for making that right operative. Had the Legislature of the Province enacted that its tribunals were not to give effect to the right which the Dominion Parliament had conferred in the exercise of its exclusive jurisdiction, a serious question would have arisen as to whether such an enactment was valid. But not only is there no such enactment but, on the mere question of construction of the language of the Provincial Act of 1907, their Lordships are of opinion that a well-known rule makes it plain that the language there used ought to be interpreted as not excluding the jurisdiction. If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in

some other Court. This is the effect of authorities, such as the well-known judgment of Lord Mansfield in *Mostyn* v. *Fabrigas* (1), and the judgment of Lord Hardwicke in *Earl of Derby* v. *Duke of Athol.* (2) They are collected in the admirable opinion of Stuart J. in the Supreme Court in the present case, from whose reasoning, as well as from the arguments employed by the other learned judges there, their Lordships have derived much assistance. They only desire to add that independently of the rule just referred to, there is another principle of construction which would, in their opinion, have been, by itself, sufficient to dispose of the question whether the words of the Act of 1907 excluded matrimonial jurisdiction. That Act set up a Superior Court, and it is the rule as regards presumption of jurisdiction in such a Court that, as stated by Willes J. in *London Corporation* v. *Cox* (3), nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so.

As the result their Lordships entertain no doubt that the second point raised was decided correctly as well as the first one. They will therefore humbly advise His Majesty that the appeal should be dismissed. As costs have not been asked for there will be no costs of this appeal.

Solicitors for appellant : *Lawrence Jones & Co.*

Solicitors for respondent and intervenant : *Blake & Redden.*

(1) (1774) 1 Cowp. 161. (2) (1748) 1 Ves. Sen. 201.
(3) (1867) L. R. 2 H. L. 239, 259.

J. C.*
1919
July 8.

[PRIVY COUNCIL.]

THE KRONPRINZESSIN CECILIE.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Cargo—Condemnation—Appeal—Appellants not Owners—Absence of locus standi.

Persons who were not the owners of goods at the time of their seizure in prize cannot maintain an appeal against their condemnation, and have no locus standi to ask either that the proceedings should be amended by making the owners parties, or that the Board should vary an apparently incorrect decree appealed from.

APPEAL from a judgment of the Admiralty Division (in Prize). (1)

The material facts appear from the judgment of their Lordships.

1919. June 17. *Kerly K.C.* and *J. G. Joseph* for the appellants. It is conceded that the goods were enemy property. Having regard however to the decision of the Board as to the ship (see *The Prinz Adalbert* (2)), and to art. 4 of Hague Convention No. 6, it is clear that the goods should not have been condemned but a detention order made in the form adopted in *The Chile*. (3) The appellants owned all the shares in the companies to which goods were consigned, and were and are the persons really interested. No question was raised before the President whether the right parties were claimants; if it had been they could have been joined. The order being manifestly incorrect should be varied on this appeal although the appellants are not the owners. If that course is not taken, the matter should be remitted to the Prize Court in order that the consignees may be joined and the right decree made. Under Order III., r. 1, of the Prize Court Rules a party interested may

* *Present:* LORD PARMOOR, LORD WRENBURY, LORD STERNDALE, and SIR ARTHUR CHANNELL.

(1) Unreported.

(2) [1918] A. C. 500, 501, n. (2).

(3) [1914] P. 212, 217.

intervene at any time down to final adjudication. [Reference was also made to *The Palm Branch.* (1)]

R. A. Wright K.C. (with him *Sir Gordon Hewart A.-G.*) for the Crown. The appellants not being the owners of the goods cannot maintain this appeal: *The Proton* (2); *The Antilla.* (3) The matter should be dealt with only so far as it is brought before the Board by a properly constituted appeal. In *The Palm Branch* (1) the Board varied the order made below, but only on the consent of the Crown. Having regard to the circumstances of the present claim the Crown cannot consent to any variation in the present case.

Kerly K.C. replied.

July 8. The judgment of their Lordships was delivered by

LORD PARMOOR. The appellants are a corporation incorporated according to the laws of the State of New York in the U.S.A., with registered office and place of business at Rochester, in the State of New York. In July, 1914, the appellants shipped certain barrels of oil, and one box of brass stencils, on the steamship *Kronprinzessin Cecilie*, a ship which belonged to the Hamburg-Amerika Steamship Company, incorporated under the law of the German Empire, and having its registered office at Hamburg. There are three bills of lading, one in respect of 1619 barrels of oil consigned to a German company and carrying on business in Germany, and the other two bills of lading were severally in respect of 65 barrels of oil, and in respect of 130 barrels of oil, and one box of brass stencils consigned to an Austrian company, registered and carrying on business in Vienna. In all cases the goods were shipped f.o.b., and at the time of seizure were the property of the German and Austrian companies respectively. It was stated by counsel that the shares in the German and Austrian companies were wholly owned by the New York company. The evidence is that with the exception of two small shareholders, who were respectively citizens of Denmark and Italy, all the shareholders in both

(1) [1919] A. C. 272. (2) [1918] A. C. 578, 584.
(3) [1919] A. C. 250.

J. C. 1919 THE KRONPRINZESSIN CECILIE.

companies are citizens of the U.S.A. The appellants undertook with both the German and Austrian companies to bear the loss by failure of either of them to receive any consignment by reason of the seizure thereof, but the liability to seizure depends on the ownership of the property, and not on the risk of loss from failure of the adventure.

The *Kronprinzessin Cecilie* was diverted to Falmouth on August 3, 1914, and on August 5 the ship and goods were seized. When the case of the ship came before the Prize Court, the late President, Sir Samuel Evans, condemned her on the ground that the provisions as to detention in the Hague Convention did not apply. This Board, however, decided on appeal that the proper order to make was an order for detention, and the order for condemnation was set aside. The question of the condemnation of the goods was heard by the late President on the day after the condemnation of the ship, and their condemnation followed as a necessary consequence. The appellants claim that they are entitled to a detention order in the same form as that which has been made in the case of the ship, and there is no reason to doubt that such an order would have been made if this case had stood over until after the decision by this Board on appeal had been given in the case of the ship.

The first point, however, to be decided is whether the appellants, not being at the time of seizure owners of the goods, have any interest in the goods such as would entitle them to be heard on the appeal. Their Lordships are of opinion that the appellants, not being owners of the goods, have no such interest, and that on this ground alone the appeal must be dismissed. It was, however, argued before their Lordships that either an amendment should be allowed to enable the owners of the goods to be made parties to the proceedings, or that their Lordships would correct an error in the order of the Court below, in whatever way it had been brought to their notice. Their Lordships intimated during the hearing that an application for amendment could not be entertained at the instance of appellants who had themselves no interest which entitled them to be heard. The same principle applies to the argument that their

Lordships should correct an error, brought to their notice by the appellants, in the order made in the Prize Court. The appellants having no such interest in the goods as would entitle them to be heard are in the position of mere outsiders and have no locus standi either to criticise the order of the Court below, or to ask that such order should be varied or set aside. In *The Proton* (1) it was held that the claimant was not at the time owner of the vessel and consequently could not maintain the appeal. Lord Sumner, in delivering their Lordships' judgment, said: "If the learned judge's first finding is right, this appeal fails, for M. Kouremetis (the appellant) has no character except that of owner in which he can claim to have the ship released to him, and, if not her owner, has no locus standi to criticize or complain of her condemnation."

In *The Antilla* (2) it was held that the appellants were not entitled as of right to appeal under s. 5 of the Naval Prize Act, 1864. The following passage occurs in the judgment of their Lordships: "Although it be the case that the effect of the adjudication, which was ultimately arrived at, was to bar the further chance of the claimants obtaining the goods, apart from the bar imposed by the fact that the appellants were silenced by being struck out of the case, their Lordships think upon the true view that they cannot be heard to question on appeal a final decree for condemnation, which, however it may affect their interests, was made after they had been validly dismissed from the proceedings and were no longer before the Court." There is no difference in principle between hearing a party validly dismissed from a suit, and a party who has no interest in the goods condemned and has failed to establish any right to appear or be heard.

In *The Palm Branch* (3) an order was made by consent of the Crown that the condemnation should be set aside and the proceeds of the goods remain in the Prize Court. In the present case, the Attorney-General, who appeared on behalf of the Crown, was asked to consider whether, under the special

(1) [1918] A. C. 578, 584. (2) [1919] A. C. 250, 253.
(3) [1919] A. C. 272.

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conditions, the consent of the Crown might not be given as in the case of the *Palm Branch*, but it was stated to their Lordships that there were reasons which prevented the Crown adopting this course. The decision of their Lordships in this case has reference to the hearing of a case on appeal, and has no reference to procedure in the Prize Court.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Kerly, Sons & Karuth.*
Solicitor for respondent: *The Treasury Solicitor.*

J. C.* 1919 *July* 15.

[PRIVY COUNCIL.]

SALTI ET FILS . . . . . APPELLANTS;

AND

THE PROCURATOR-GENERAL . . . RESPONDENT.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Trading with the Enemy—Goods sent to Agent in China for Sale—"Supply"—Trading with the Enemy Proclamation, No. 2, 1914, cl. 5 (7.)—Trading with the Enemy (China, Siam, Persia and Morocco) Proclamation, 1915.

The appellants, who were Ottoman subjects carrying on business in England, in September and November, 1915, posted to their agent, an Austrian subject, at Shanghai packets of diamonds for sale on their behalf. The diamonds were returned to England by the postal authorities and were seized in the Postal Censor's office in November, 1917. They were condemned on the ground that the transaction was a trading with the enemy:—

Held, that the diamonds were properly condemned, since under the Trading with the Enemy (China, Siam, Persia and Morocco) Proclamation, 1915, the appellants' agent was for the purpose of the Trading with the Enemy Proclamation, No. 2, 1914, an "enemy," and the transaction was a supplying him with goods contrary to cl. 5 (7.) of the latter Proclamation.

Decree of the Prize Court affirmed.

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* *Present:* LORD PARMOOR, LORD WRENBURY, LORD STERNDALE, and SIR ARTHUR CHANNELL.

APPEAL from a judgment of the Admiralty Division (in Prize), dated July 18, 1918. (1)

The appellants, H. Salti et Fils, who were Ottoman subjects, appealed from so much of a decree of the President (Sir Samuel Evans) as pronounced that three packets of diamonds should be condemned as lawful prize.

The facts and the terms of the Proclamations, so far as material, appear from the judgment of their Lordships.

1919. June 17, 19. *Inskip K.C.* and *J. C. Conway* for the appellants. Blode was not an "enemy" for the purpose of the Trading with the Enemy Proclamation, No. 2, of 1914, or at common law. The test is not nationality or allegiance, but whether the domicil, including commercial domicil, is in an enemy country: *Janson* v. *Driefontein Consolidated Mines* (2); *Porter* v. *Freudenberg* (3); *The Anglo-Mexican* (4); preamble to Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12); Trading with the Enemy Proclamation, No. 2 (September 9, 1914), cl. 3. The Trading with the Enemy (China, Siam, Persia and Morocco), 1915, has no application, as the preamble refers only to trading between British subjects and persons of enemy nationality, whereas the appellants were not British subjects. But in any case, the transaction between the appellants and Blode was not within any of the prohibitions contained in cl. 5 of the Proclamation of September 3, 1914. It did not come, as was held, within head 7 of that clause. The appellants, in sending the diamonds to Blode to be sold on their behalf, did not "supply" him within the meaning of the Proclamation; that is so even if he were their agent, but he was in fact merely their servant. Further, the seizure was in November, 1916, and at that date the appellants were carrying on business at Amsterdam, and were not subject to the Proclamation. Trading with the enemy is a criminal offence, and the onus upon the Crown was not satisfied.

Sir Gordon Hewart A.-G. and *Trickett* for the Crown. It is not necessary to consider whether the transaction was

(1) Unreported.
(2) [1902] A. C. 484, 505.
(3) [1915] 1 K. B. 857, 867.
(4) [1918] A. C. 422.

J. C. 1919 SALTI ET FILS v. THE PROCURATOR-GENERAL.

at common law a trading with the enemy, because it was within the Proclamations. The appellants, as persons licensed to trade, cannot for the purposes of the Trading with the Enemy (China, etc.) Proclamation be in a better position than British subjects. The preamble does not limit the effect of the operative words which constituted Blode an enemy in regard to the transaction. The transaction was within heads 7 and 9 of cl. 5 of the Trading with the Enemy Proclamation, No. 2, of 1914.

Inskip K.C. replied.

July 15. The judgment of their Lordships was delivered by

LORD WRENBURY. The claimants are Ottoman subjects. For some thirty years before the war they had carried on business in Antwerp as diamond merchants. Owing to the invasion of Belgium by the Germans they left Antwerp in August, 1914, and came to London. On December 23, 1914, they obtained from the Treasury an authority to trade as diamond merchants in this country on conditions which are not relevant to anything here to be decided. In November, 1915, they left this country for Amsterdam, and have since remained there.

In September, 1915, the claimants sent by post from London two registered packets of diamonds addressed to James Blode at the American Post Office, Shanghai, and in November, 1915 (before they left this country), sent a third registered packet to James Blode at the American Post Office, Shanghai. James Blode was an Austrian subject. By an agreement in writing made in 1913 the claimants had engaged him as their agent to sell their goods in Eastern Asia for a period of five years at a salary without commission upon the terms that he should not represent any other firm as agent. The diamonds were sent to him as such agent for sale. The packets of diamonds reached the British Post Office at Shanghai and were returned by the Post Office to the Chief Postal Censor in London on the ground that, being addressed to James Blode, an enemy subject, they were not deliverable. On November 29, 1916, the Postal Censor's Office in London seized the packets as prize to the use of His Majesty.

On June 12, 1917, the Procurator-General issued a writ claiming the condemnation of the goods.

It is not disputed that the goods were confiscable if the transactions between the claimants and Blode amounted to trading with the enemy or intercourse with the enemy. In their Lordships' opinion it is not necessary to determine whether the goods were confiscable at common law. The case is, in their judgment, covered by the Proclamations to which they proceed to refer.

The Trading with the Enemy Proclamation, No. 2, dated September 9, 1914, after reciting in the preamble that it was "expedient and necessary to warn all persons resident, carrying on business, or being in Our Dominions, of their duties and obligations towards Us" went on to declare that: "3. The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country. . . . . 5. From and after the date of this Proclamation the following prohibitions shall have effect (save so far as licences may be issued as hereinafter provided), and We do hereby accordingly warn all persons resident, carrying on business or being in Our dominions: . . . . (7.) Not directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy country, or an enemy, any goods, wares or merchandise, nor directly or indirectly to supply to or for the use or benefit of, or obtain from any person any goods, wares or merchandise, for or by way of transmission to or from an enemy country or an enemy, nor directly or indirectly to trade in or carry any goods, wares or merchandise destined for or coming from an enemy country or an enemy. . . . . (9.) Not to enter into any commercial, financial or other contract or obligation with or for the benefit of an enemy."

The claimants as persons resident and carrying on business in this country were within the words of the preamble and were

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within the Proclamation. But James Blode was not within art. 3, for although of enemy nationality, he was neither resident nor carrying on business in an enemy country.

On June 25, 1915, however, a further Proclamation was made —namely, the Trading with the Enemy (China, Siam, Persia, and Morocco) Proclamation, 1915. This Proclamation, by its preamble, recited that it was expedient that "transactions between British subjects and persons of enemy nationality resident or carrying on business in China, Siam, Persia or Morocco should be restricted in manner provided by this Proclamation," and declared that: "1. The Proclamations for the time being in force relating to trading with the enemy shall, as from the twenty-sixth day of July, nineteen hundred and fifteen, apply to any person or body of persons of enemy nationality resident or carrying on business in China, Siam, Persia or Morocco in the same manner as they apply to persons or bodies of persons resident or carrying on business in an enemy country."

James Blode was a person of enemy nationality resident or carrying on business in China. He was therefore within clause 1 of this latter Proclamation, and consequently the former Proclamation applied to him. As already pointed out, the claimants were within the former Proclamation. The result is that the former Proclamation applies to both the claimants and Blode, unless it can be said that the words "British subjects" in the preamble to the latter Proclamation have the effect of confining to British subjects the operative words of the latter Proclamation which render the former Proclamation applicable. In their Lordships' opinion those words have not that effect. The generality of the words in the operative part is not as matter of construction restricted by the words of the preamble. Further, it cannot be that the intention of the Proclamation was to give to persons resident in, and amenable to the laws of, this country, but not in the full sense of the words "British subjects," a greater liberty than was allowed to subjects of the British Crown.

It remains to consider whether any words in the former Proclamation cover the present case.

The transaction between the claimants and Blode was not one in which the former were trading with the latter or entering into any commercial contract with him. Their Lordships do not rely on sub-clause (9). Neither is it necessary to rely on the concluding words of sub-clause (7). The first words of (7), in their opinion, cover this case. The claimants were supplying to Blode goods, wares or merchandise, and none the less because they were supplying them to him as agent for sale on behalf of the claimants. Blode was not a mere servant. He was an agent for sale—an agent precluded by contract from representing any other firm as agent. He would have authority to fix a price, to give credit, and to act on behalf of his principals in any manner in which an agent for sale may bind his principal. A principal in distributing his goods amongst his agents for sale and sending so many parcels to A., so many to B., and so on, is correctly described as supplying the goods to his agent. The context of the clause is "supply to or for the use or benefit of." The supply, therefore, need not be "for the use or benefit of" the person; it is sufficient that the supply shall be to him. In their Lordships' opinion the first words of sub-clause (7) cover this case.

For these reasons their Lordships hold that these goods were rightly condemned, and that the appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitor for appellants: *A. M. Oppenheimer.*
Solicitor for respondent: *The Treasury Solicitor.*

J. C.*
1919
July 31.

[PRIVY COUNCIL.]

THE LEONORA.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Retaliation—Order in Council of October 16, 1917—Inconvenience to Neutrals—Carrying Goods of Enemy Origin—Coal from Belgian Collieries in German Occupation.

An Order in Council of February 16, 1917, after reciting that a German Memorandum of February 1, 1917 (aimed at preventing all sea traffic with Great Britain and her Allies), rendered it necessary for further measures to be adopted to prevent commodities of any kind reaching or leaving enemy countries, provided that vessels encountered at sea on their way to or from ports in neutral countries affording access to enemy territory would, until the contrary was established, be deemed to be carrying goods with an enemy destination or of enemy origin, and that such goods would be subject to condemnation. The vessels carrying them would also be subject to condemnation, provided that in the case of a vessel which called at an appointed British or Allied port for examination of her cargo, condemnation under the Order should not be pronounced. No port or ports were appointed under the Order.

A Dutch steamship bound direct from Rotterdam to Stockholm with a cargo of coal, the produce of Belgian collieries in German occupation, was seized as prize off the Dutch coast under the authority of the above Order, and ship and cargo were condemned. The coal had been won, sold, and shipped as part of a German Government trade, carried on for the benefit of the enemy in prosecuting the war.

Held (1.) that the Order was not contrary to the law of nations; and, upon the evidence, was not invalid as subjecting neutrals to unreasonable inconvenience, having regard to the circumstances; (2.) that the coal was of "enemy origin"; (3.) that the appointing of a port of examination was not a condition to condemnation under the Order; and (4.) that accordingly the ship and cargo were properly condemned.

The Stigstad [1919] A. C. 279 applied.

Decrees of the Prize Court affirmed.

APPEALS from decrees of the Admiralty Division (in Prize) dated April 18, 1918. (1)

The appellants in the two appeals were respectively the owners of the Dutch steamship *Leonora* and the owners of a cargo of coal which she was carrying when captured. The

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, LORD STERNDALE, and SIR ARTHUR CHANNELL.

(1) [1918] P. 182.

ship and cargo were seized and condemned under an Order in Council of February 16, 1917, known as the second retaliatory Order. The facts appear from the judgment of their Lordships. The Order in Council is fully set out in the report of the hearing before the President.

1919. January 23, 24, 27, 28, 30, 31. *Sir John Simon K.C.* (with him *Sir Erle Richards K.C.*, *MacKinnon K.C.* and *Bisschop*) for the appellant shipowners; *Leslie Scott K.C.* (with him *Balloch*, *Stuart Bevan* and *Le Quesne*) for the appellant cargo-owners. Neither the ship nor the cargo should have been condemned. The Order in Council of February 16, 1917, was invalid; first, it was intrinsically invalid under the rule laid down in *The Zamora* (1), because it purported to create an offence unknown to the law of nations, and to punish neutrals who committed that offence. The question in the present appeal is fundamentally different from that in *The Stigstad*. (2) In that case neutrals were claiming compensation for loss caused to them by an exercise of the first retaliatory Order of March 11, 1915; in the present case the Crown claims, under the later Order, to inflict the punishment of condemnation upon a neutral ship and cargo. The judgment in *The Stigstad* (2) cites with approval, and is based upon, two passages in *The Zamora* (3) as to retaliatory Orders in. The appellants rely upon those passages. The first, because this is not a case of merely "an inconvenience greater in degree" than that which could be justified apart from retaliation; the second, because the means of retaliation here taken were unlawful in relation to neutrals. An Order in Council cannot confer on the Prize Court the power or duty to punish neutrals for that which is not a breach of belligerent rights according to the law of nations. A blockade, no doubt, is declared by Order in Council; but the punishment for a breach is imposed by international law. The Order is in conflict with the Declaration of Paris; with art. 3, in that it takes away

(1) [1916] 2 A. C. 77, 96. (2) [1919] A. C. 279.
(3) [1916] 2 A. C. 77, 95, 98.

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neutral carrying rights; with art. 4, because it purports to establish a paper blockade. No country previously had sought to condemn neutral ships for trading between neutral ports. The French Berlin Decree of 1806 (1) applied only to trade with England, and did not provide for condemnation of neutral ships except for making false declarations. The first British retaliatory Order in Council of 1807 applied only to ships passing between enemy ports; the second Order of that year applied only where the port of delivery, or the port of departure, was an enemy port. There is a consensus of opinion among jurists that the British retaliatory Orders of the Napoleonic wars were contrary to the law of nations. That view is strongly expressed by Sir Robert Phillimore (International Law, vol. 3, paras. 169, 175). No writer on international law has attempted to justify them except Manning in ch. 10 of his Law of Nations. Foreign jurists treat them as coming under the law of blockade: de Marten's Précis du droit des gens (ed. 1864, Vergé), vol. 2, par. 326 (*b*); Heffter, Le droit international de l'Europe (ed. 1873, trad. Bergson), par. 157; Despagnet, Cour de droit international, par. 619; Rivier, Principes du droit des gens, par. 194; see also Sir Frederick Smith, International Law, 5th edn. p. 369; and Westlake, Collected papers on international law, p. 312. But it is clear that the present Order cannot be so treated, since it purported to establish a blockade of neutral ports, also because it conflicts with art. 4 of the Declaration of Paris. Lord Stowell, in the numerous cases which arose under the British retaliatory Orders, and which are reported in Edwards' Reports and Dodsley's Reports, considered (the contrary not being argued before him) that he was bound to regard an Order in Council as being in conformity with the law of nations (see *The Fox* (2)); a view disapproved by the Board in *The Zamora*. (3) Those decisions therefore afford no support to the present Order. The trading rights of neutrals have been considered by three international

(1) The Berlin and Milan decrees and the British Orders in Council of 1807 are printed in Appendix D to Edwards' Reports.

(2) (1811) Edw. 311, 312, 313.

(3) [1916] 2 A. C. 77.

conferences, namely, those at Paris in 1856, the Hague in 1907, and London in 1909. Neither the exhaustive declarations made as a result of those conferences nor the writings of any jurist suggest that a belligerent can take retaliatory measures at the expense of neutral traders. Secondly, if the Order in Council is not intrinsically invalid it is so under the rule laid down in *The Stigstad* (1), in that it imposes upon neutrals inconvenience greater than was reasonable considering the circumstances in which the Order was made. In considering that question regard must be had to the established trading rights of neutrals as well as to the rights of belligerents. As already pointed out the Order imposes far greater inconveniences than those of the Napoleonic wars, which were of doubtful validity; further those Orders were greatly mitigated by the numerous licences granted: Holland Rose, Cambridge Modern History, vol. 9, p. 375. The right to retaliate upon the enemy ceases when the ground for it ceases; therefore condemnation is beyond what is reasonable. Detention till the end of the war would have been a sufficient means of enforcing the Order. The evidence conclusively showed that by putting into an English port the risk of a voyage between Rotterdam and Swedish ports was greatly increased by British and German mines and by German submarines. A direct voyage could have been made by a safe channel buoyed between the minefields.

Further, the duty imposed upon neutral ships by the Order was to call at an appointed English port, but no port had been appointed either generally, or specially with regard to the *Leonora*. Alternatively, when the *Leonora* was stopped and ordered to Harwich, that port became the appointed port, and the ship, having proceeded there, was exempt from condemnation under the Order.

Lastly, the cargo was not "of enemy origin." It was coal from a colliery in Belgium. The fact that the colliery was in a part of Belgium occupied by the enemy, and was worked under the control of the German Government, did not make the coal "of enemy origin." The reference in

(1) [1919] A. C. 279.

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cl. 1 of the Order to "enemy territory" and the definition of "enemy origin" in cl. 1 of the earlier Order show that the true test is geographical. In order to make trading with persons in occupied parts of Belgium an offence it was necessary to supplement the Trading with the Enemy Act, 1914, which referred to persons in "enemy country," by the Trading with the Enemy (Occupied Territory) Proclamation, 1915. [Reference was made to *Porter* v. *Freudenberg* (1), *Société Anonyme Belge* v. *Anglo-Belgian Agency* (2), and *The Gerasimo.* (3)]

Their Lordships did not desire to hear counsel for the Crown in answer to the contention that the Order in Council was intrinsically invalid.

Sir Ernest Pollock S.-G. and *Greer K.C.* (*Sir Gordon Hewart A.-G.*, *Pearce Higgins* and *Clive Lawrence* with them) for the Crown. The coal was "of enemy origin" within the meaning of the Order in Council. The test is whether the place in which the coal was produced was under the control of the enemy and a place which he could consequently use for the purposes of the war: *The Gutenfels* (4), citing Hall's International Law, 6th ed., p. 505; *The Gerasimo.* (3) This was enemy coal according to that test; further, it was produced, sold, and exported by the German Government, and by the contract of sale was to be delivered in Sweden to such consumers as that Government should select. The Order recites that it is directed against "the commerce of the enemy"; this was German commerce. The definition in the earlier Order is only for the purposes of that Order. In any case, the coal was bought from Germans, and the appellants did not discharge the onus of showing that it was not "of enemy origin." Secondly, the Order does not make the appointing of a port a condition to the liability to condemnation. The words as to calling at an appointed port for examination are a proviso in mitigation. Owing to the continually varying risks of navigation it was not possible

(1) [1915] 1 K. B. 857.
(2) [1915] 2 Ch. 409.
(3) (1857) 11 Moo. P. C. 88.
(4) [1916] 2 A. C. 112, 118.

to appoint a port permanently, nor at all at the date of the seizure. The appellants did not apply to have a port appointed. The *Leonora* was within the Order when stopped, the subsequent order to proceed to Harwich was not the appointment of a port for the purpose of the proviso. Thirdly, the Order did not entail upon neutrals inconvenience which was unreasonable having regard to the circumstances, so as to be invalid under the rule laid down in *The Stigstad.* (1) According to the judgment in that appeal (2), the first question is whether the measures of retaliation adopted "are in their nature or extent other than commensurate with the prior wrong done"; if they are, it has then to be seen that those measures are taken in such a way as to inflict not unreasonable inconvenience on neutrals. The enormity of the breaches of the law of nations committed by the German Government appears from the affidavit evidence and from the judgment of the President, and shows that the measures were commensurate with the wrong done; the means taken entailed as little inconvenience to neutrals as was consistent with the Order being effective as against the enemy. Neutrals have no inherent right to continue to trade in goods of enemy origin: *The Nereide* (3); *The Emanuel.* (4) The stopping of German trade with neutrals was a proper retaliatory measure against the enemy, and that necessarily involved stopping the trade of neutrals with Germany. The appellants suggested no other effective means of retaliation against the outrageous breaches of the law of nations committed by the enemy. It was said that detention would have been an appropriate punishment for a breach; but, apart from Conventions, international law recognizes only condemnation as a weapon which a belligerent can use through the Prize Court. The evidence as to the large number of ships sunk by German submarines after the first Order, which provided only for detention, shows that detention was not an effective means of retaliation. The forbidden trade was so lucrative that detention was not a sufficient deterrent. The Order

(1) [1919] A. C. 279.
(2) [1919] A. C. 279, 286.
(3) (1815) 9 Cranch, 388, 438.
(4) (1799) 1 C. Rob. 296.

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in Council of November 11, 1807, went at least as far as the present Order, as it forbade all trade in articles produced by, or manufactured in, France or its colonies, and purported to blockade not only the ports of that country and its colonies, but all neutral ports from which the British flag was excluded.

Sir Erle Richards K.C. (by leave) in reply. Goods "of enemy origin" means goods originating in an enemy country. The coal originated at the pit in Belgium. Military occupation differs essentially from conquest; it gives the belligerent only the right to administer the occupied territory and to take such measures as are necessary to protect its military operations. If *The Nereide* (1) says that enemy occupation turns the territory of a neutral or ally into hostile territory, it is overruled by *The Gerasimo.* (2) *The Gutenfels* (3) related only to the effect of the sixth Hague Convention, and turned upon actual possession of the port.

The Order was invalid as entailing an unreasonable degree of inconvenience to neutrals. Though the measure of reprisals upon land may be solely the conduct of the enemy, it is not so upon the sea, since the sea is not within the sovereignty of any belligerent, and neutrals' rights upon it are well recognized by international law. Those rights have been strengthened since the Napoleonic wars. Neutrals cannot be exposed by reprisals to unlimited inconvenience because they do not intervene to stop the unlawful acts of the enemy. In the case of two belligerents taking competing retaliatory measures, how is the neutral to determine which is the real offender? A contrary view would conflict with international law, which aims at preventing hostilities. The Order was unreasonable in the following specific respects: (1.) it exposed neutral ships to the risk of crossing a very dangerous area, when the object could have been obtained by examination at the port of departure; (2.) it condemned neutral ships, however small the quantity of goods of enemy origin carried, and whether the character of the goods was or was not known to the owners; (3.) it applied to neutral ports of delivery

(1) 9 Cranch, 438. (2) 11 Moo. P. C. 88.
(3) [1916] 2 A. C. 112.

which had no access to Germany. Further, on the analogy of a blockade, which to be lawful must apply to all trade, it was bad because it left untouched enemy trade across the Baltic.

July 31. The judgment of their Lordships was delivered by

LORD SUMNER. The *Leonora*, a Dutch steamship bound from Rotterdam to Stockholm direct, was stopped on August 16, 1917, by His Majesty's torpedo-boat F77, outside territorial waters, and shortly after passing Ymuiden. She was taken into Harwich. Her cargo, which was neutral-owned, consisted of coal, the produce of collieries in Belgium. It was not intended that she should call at any British or Allied port, nor had any application been made on her behalf for the appointment of a British port for the examination of her cargo. Both ship and cargo were condemned, pursuant to the Order in Council, dated February 16, 1917, and both the shipowners and the cargo owners appeal.

Their Lordships are satisfied that the cargo was "of enemy origin" within the meaning of pars. 2 and 3 of that Order. The term had been used in the Order of March 11, 1915, par. 4, and, owing to doubts as to the effect of the word "enemy" therein, a further Order was made on January 10, 1917, which applied the term "enemy origin," as used in that paragraph, to goods "originating in any enemy country." In the present case, the question is one of the interpretation of the third Order, that of February 16, 1917, which, beyond saying that it is supplemental to the above-mentioned Orders, makes no further express reference to them, but from the recital as to the recent proceedings of the German Government, it is plain that the Order of 1917 dealt with a wider mischief and was intended to have a wider scope than the previous Order. It is therefore necessary to have regard to the system of exploitation then in force in Belgium for the advancement of German interests, in order to appreciate the full effect of the words "enemy origin." It is not necessary to inquire whether, within the terms of the Order, a Belgian origin could, as such, be regarded as an "enemy" origin for this

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purpose, or what the effect, if any, of the German occupation might be on the view to be taken of the nationality of persons resident in Belgium. The collieries from which this coal came were included in the German "Kohlenzentrale," a system by which the coal production of Belgium was strictly controlled and was compulsorily manipulated, with the object of supporting German exchange and assisting German commercial transactions with neutral countries, especially Holland and Sweden. In particular, the export of Belgian coal to Sweden was encouraged, because it assisted to procure a reciprocal importation of ore from Sweden. The actual sale of this very cargo was arranged in Cologne by an official of the Kohlenzentrale in his own name, nor is it proved that he was, in fact, selling on behalf of some undisclosed principal, either in Belgium or elsewhere. Payment for it was made by lodging Swedish kroner in a Stockholm bank to the credit of the Kohlenzentrale. It is stated in the German regulations that "the amount realised by the sale will be paid to the vendors," whoever they may have been. Perhaps this may have been so; for if no money at all reached the colliery, presumably the getting of coal there would come to an end; but whatever crumbs may have been allowed to fall from the masters' table, the fact is clear that these coals were won, sold, and shipped as part of a German Government trade, carried on for the benefit of the enemy in prosecuting the war. To deny to them the term "of enemy origin," as used in this Order, would be pedantic. The Order is devised to give effect to a scheme of retaliation, which will compel the enemy to desist from outrageous conduct, by crippling or preventing trade in goods which in a broad, but very real, sense he made his own. It does not employ this expression "of enemy origin" as a mere geographical term, nor as merely descriptive of the nationality of the original owners of the coal, who were involuntary, and probably reluctant, victims of the German system. Upon this point the view of their Lordships is that the learned President's conclusion was right.

The appellants' main case was that the Order in Council

was invalid, principally on the ground that it pressed so hardly on neutral merchants and interfered so much with their rights that, as against them, it could not be held to fall within such right of reprisal as a belligerent enjoys under the law of nations. A subordinate part of their argument was that in its application to the *Leonora* the Order was bad, because no British port had been appointed at which she would call for the examination of her cargo. In so far as this circumstance forms part of the general hardship to neutrals it will be dealt with presently. As a separate point their Lordships think that it fails, for the language of the Order in Council does not constitute the appointment of some British port for examination of the cargoes, either of this ship or of ships in general, a condition precedent to the application of the Order. The proviso relieving vessels which call at an appointed port operates not as a prescription of the circumstances under which alone such application is admissible, but merely as a mode of mitigating the stringency of the Order. The evidence discloses no reason why the appointment of a convenient port should not have been applied for to facilitate the *Leonora's* voyage, and a difficulty cannot be relied on as a circumstance of excessive inconvenience to neutrals, which it was in their power to remove by such simple means.

Upon the validity of the Order in Council itself the appellants advanced a two-fold argument. The major proposition was that the Order purported to create an offence, namely, failure to call at a British or Allied port, which is unknown to the law of nations, and to impose punishment upon neutrals for committing it; in both respects it was said that the Order is incompetent. The minor proposition was that the belligerent's right to take measures of retaliation, such as it is, must be limited, as against neutrals, by the condition that the exercise of that right must not inflict on neutrals an undue or disproportionate degree of inconvenience. In the present case various circumstances of inconvenience were relied on, notably the perils of crossing the North Sea to a British port of call and the fact that no particular port of call in Great Britain had been appointed for the vessel to proceed to.

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In *The Stigstad* (1) their Lordships had occasion to consider and to decide some at least of the principles upon which the exercise of the right of retaliation rests, and by those principles they are bound. In the present case, nevertheless, they have had the advantage of counsel's full re-examination of the whole subject, and full citation of the authorities, and of a judgment by the President in the Prize Court, which is itself a monument of research. The case furthermore has been presented under circumstances as favourable to neutrals as possible, for the difference in the stringency of the two Orders in Council, that of 1915 and that of 1917, is marked, since in the case of the later Order the consequences of disregarding it have been increased in gravity and the burden imposed on neutrals has become more weighty. If policy or sympathy can be invoked in any case they could be and were invoked here.

Their Lordships, however, after a careful review of their opinion in *The Stigstad*, think that they have neither ground to modify, still less to doubt that opinion, even if it were open to them to do so, nor is there any occasion in the present case to embark on a general re-statement of the doctrine or a minute re-examination of the authorities.

There are certain rights, which a belligerent enjoys by the law of nations in virtue of belligerency, which may be enforced even against neutral subjects and to the prejudice of their perfect freedom of action, and this because without those rights maritime war would be frustrated and the appeal to the arbitrament of arms be made of none effect. Such for example are the rights of visit and search, the right of blockade and the right of preventing traffic in contraband of war. In some cases a part of the mode in which the right is exercised consists of some solemn act of proclamation on the part of the belligerent, by which notice is given to all the world of the enforcement of these rights and of the limits set to their exercise. Such is the proclamation of a blockade and the notification of a list of contraband. In these cases the belligerent Sovereign does not create a new offence motu

(1) [1919] A. C. 279.

proprio; he does not, so to speak, legislate or create a new rule of law; he elects to exercise his legal rights and puts them into execution in accordance with the prescriptions of the existing law. Nor again in such cases does the retaliating belligerent invest a Court of Prize with a new jurisdiction or make the Court his mandatory to punish a new offence. The office of a Court of Prize is to provide a formal and regular sanction for the law of nations applicable to maritime warfare, both between belligerent and belligerent and between belligerent and neutral. Whether the law in question is brought into operation by the act of both belligerents in resorting to war, as is the case with the rules of international law as to hostilities in general, or by the assertion of a particular right arising out of a particular provocation in the course of the war on the part of one of them, it is equally the duty of a Court of Prize, by virtue of its general jurisdiction as such, to provide for the regular enforcement of that right, when lawfully asserted before it, and not to leave that enforcement to the mere jurisdiction of the sword. Disregard of a valid measure of retaliation is as against neutrals just as justiciable in a Court of Prize as is breach of blockade or the carriage of contraband of war. The jurisdiction of a Court of Prize is at least as essential in the neutral's interest as in the interest of the belligerent, and if the Court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other. Capture and condemnation are the prescriptive and established modes by which the law of nations as applicable to maritime warfare is enforced. Statutes and international conventions may invest the Court with other powers or prescribe other modes of enforcing the law, and the belligerent Sovereign may in the appropriate form waive part of his rights and disclaim condemnation in favour of some milder sanction, such as detention. In the terms of the present Order, which says that a vessel (par. 2) shall be "liable to capture and condemnation" and that goods (par. 3) shall be "liable to condemnation," some argument has been found for the appellants' main proposition, that the

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Order in Council creates an offence and attaches this penalty, but their Lordships do not accept this view. The Order declares, by way of warning and for the sake of completeness, the consequences which may follow from disregard of it; but, if the occasion has given rise to the right to retaliate, if the belligerent has validly availed himself of the occasion, and if the vessel has been encountered at sea under the circumstances mentioned, the right and duty to bring the ship and cargo before a Court of Prize, as for a justiciable offence against the right of the belligerent, has arisen thereupon, and the jurisdiction to condemn is that which is inherent in the Court. That a rebuttable presumption is to be deemed to arise under par. 1, and that a saving proviso is added to par. 2, are modifications introduced by way of waiver of the Sovereign's rights. Had they been omitted the true question would still have been the same, though arising in a more acute form, namely, does this exercise of the right of retaliation upon the enemy occasion inconvenience or injustice to a neutral, so extreme as to invalidate it as against him? In principle it is not the belligerent who creates an offence and imposes a penalty by his own will and then by his own authority empowers and directs the Court of Prize to enforce it. It is the law of nations, in its application to maritime warfare, which at the same time recognizes the right, of which the belligerent can avail himself sub modo, and makes violation of that right, when so availed of, an offence, and is the foundation and authority for the right and duty of the Court of Prize to condemn, if it finds the capture justified, unless that right has been reduced by statute or otherwise, or that duty has been limited by the waiver of his rights on the part of the Sovereign of the captors.

It is equally inadmissible to describe such an Order in Council as this as an executive measure of police on the part of the Crown for the purpose of preventing an inconvenient trade, or as an authority to a Court of Prize to punish neutrals for the enjoyment of their liberties and the exercise of their rights. Both descriptions, as is the way with descriptions arguendo, beg the question. Undoubtedly the right of

retaliation exists. It is described in *The Zamora* (1); it is decided in *The Stigstad* (2), as it had so often been decided by Sir William Scott over a century ago. It would be disastrous for the neutral, if this right were a mere executive right not subject to review in a Prize Court; it would be a denial of the belligerents' right, if it could be exercised only subject to a paramount and absolute right of neutrals to be free to carry on their trade without interference or inconvenience. This latter contention has already been negatived in *The Stigstad* (2). The argument in favour of the former, drawn from the decisions of Sir William Scott, seems to their Lordships to be no less unacceptable. With the terms of the Proclamations and Orders in Council from 1806 to 1812 their Lordships are not now concerned. They were such that the decisions on them in many cases involved not merely the use of the term "blockade" but discussion of, or at least allusion to, the nature of that right. It is, however, in their opinion a mistake to argue, as has been argued before them, that in those decisions the right to condemn was deemed to arise from the fact that the cases were cases of blockade, although the occasion for the blockade was the passing of a retaliatory Order. In their opinion Sir William Scott's doctrine consistently was that retaliation is a branch of the rights which the law of nations recognizes as belonging to belligerents, and that it is as much enforceable by Courts of Prize as is the right of blockade. They find no warrant or authority for holding that it is only enforceable by them, when it chances to be exercised under the form or the conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is such as to be invalid by reason of the burden which it imposes on neutrals, a question pre-eminently one of fact and of degree.

The onslaught upon shipping generally which the German Government announced and carried out at the beginning of 1917 is now matter of history. Proof of its formidable

(1) [1916] 2 A. C. 77. (2) [1919] A. C. 279.

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character, if proof were needed, is to be found in a comparison between the Retaliation Orders in Council of 1915 and of 1917, and their Lordships take the recitals of the latter Order as sufficiently establishing the necessity for further invoking the right of retaliation. They address themselves accordingly to what is the real question in the present appeal, namely, the character and the degree of the danger and inconvenience to which the trade of neutrals was in fact subjected by the enforcement of that Order. They do not think it necessary to criticize theoretic applications of the language of the Order to distant seas, where the enemy had neither trade nor shipping, a criterion which was argued for, but which they deem inapplicable. Nor have they been unmindful of the fact that, to some extent, a retaliatory Order visits on neutrals the consequences of others' wrongdoing, always disputed though in the present case hardly disputable, and that the other belligerent, in his turn and also under the name of Retaliation, may impose upon them fresh restrictions, but it seems to them that these disadvantages are inherent in the nature of this established right, are unavoidable under a system which is a historic growth and not a theoretic model of perfection, and are relevant in truth only to the question of degree. Accordingly they have taken the facts as they affected the trade in which the *Leonora* was engaged, and they have sincerely endeavoured, as far as in them lay, to view these facts as they would have appeared to fair-minded and reasonable neutrals and to dismiss the righteous indignation which might well become those who recall only the crisis of a desperate and terrible struggle.

Compliance with the requirements of the Order in Council would have involved the *Leonora* in difficulties, partly of a commercial and partly of a military character. Her voyage, and with it the ordinary expenses of her voyage, would have been enlarged, and the loss of time and possibly the length of the voyage might have been added to by the fact that no port or class of ports of call had been appointed for the purpose of the Order. Inconvenience of this character seems to be inevitable under the circumstances. In so far as it

is measurable entirely in terms of money, the extra expense is such as could be passed on to the parties liable to pay freight, and neither by itself nor in connection with other and more serious matters should this kind of inconvenience be rated high.

It is important to observe that the Order does not forbid the carriage of the goods in question altogether. The neutral vessel may carry them at her peril, and that peril, so far as condemnation is concerned, may be averted if she calls at an appointed port. The shipowner, no doubt, would say that if his ship is to make the call he will never be able to ship the cargo, for its chance of escape would be but small, and that if he is to get the cargo he must risk his ship and undertake to proceed direct to her destination. The contention is less formidable than it appears to be on the surface. Their Lordships know well, and the late President with his experience knew incomparably better, with what ingenuity and artifice the origin of a cargo and every other damaging circumstance about it have been disguised and concealed where the prize of success was high and the parties concerned were unfettered by scruples and inspired by no disinterested motives. They think that the chance of escape in a British port of call must be measured against the enormous economic advantage to the enemy of carrying on this export trade for the support of his foreign exchange and the benefit of his much-needed imports, and they are convinced that the chance might well be sufficient to induce the promoters of the trade both to pay, and indeed to prepay, whatever freight the shipowner might require in order to cover extra insurance and the costs of a protracted voyage, and to give to the actual shipper such favourable terms of purchase, insurance or otherwise, as would lead him to expose his cargo to the risk of detection of its origin. They are far from thinking that compliance with the Order would exclude neutrals from all the advantage of the trade. If the voyages were fewer in number they would tend to be more profitable singly, and in any case this particular traffic is but a very small part of the employment open, and legitimately so, to neutral traders,

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and the risk of its loss need not be regarded as of great moment.

There is also some evidence, though it is not very clear, that Dutch municipal law forbade, under heavy penalties, that such a deviation as would be required by a call at a British port should be made by a Dutch ship which had cleared for Sweden. If, however, the Order in Council is in other respects valid, their Lordships fail to see how the rights of His Majesty under it can be diminished or the authority of an international Court can be curtailed by local rules, which forbid particular nationals to comply with the Order. If the neutral is inconvenienced by such a conflict of duty, the cause lies in the prescriptions of his own country's law, and does not involve any invalidity in the Order.

Further, it is pointed out that, with the exception of France, the other Allied Powers did not find it necessary to resort to a similar act of retaliation, and it is contended that, upon a comparison with the Order of 1915 also, the consequences involved in a disregard of the Order of 1917 were of unnecessary severity and were unjustifiable. The first point appears to be covered by the rule that on a question of policy—and the question whether the time and occasion have arisen for resort to a further exercise of the right of retaliation is essentially a question of policy—a Court of Prize ought to accept as sufficient proof the public declarations of the responsible Executive, but in any case the special maritime position of His Majesty in relation to that of his Allies affords abundant ground for refusing to regard a different course pursued by those Allies as a reason for invalidating the Order of 1917. If the second point involves, as it seems to imply, the contention that a belligerent must retaliate on his enemy, so far as neutrals are concerned, only on the terms of compensating them for inconvenience, if any is sustained, and of making it worth their while to comply with an Order which they do not find to be advantageous to their particular interests, it is inconsistent with the whole theory on which the right of retaliation is exercised. The right of retaliation is a right of the belligerent, not a concession by the neutral. It is enjoyed

by law and not on sufferance; and doubly so when, as in the present case, the outrageous conduct of the enemy might have been treated as acts of war by all mankind.

Accordingly the most material question in this case is the degree of risk to which the deviation required would subject a neutral vessel which sought to comply with the Order. It is said, and with truth, that the German plan was by mine and by submarine to deny the North Sea to trade; that the danger, prospective and actual, which that plan involved must be deemed to have been real and great, or else the justification of the Order itself would fail; and that the deviation, which the *Leonora* must have undertaken, would have involved crossing and re-crossing the area of peril.

Their Lordships recall and apply what was said in *The Stigstad*, that in estimating the burden of the retaliation account must be taken of the gravity of the original offence which provoked it, and that it is material to consider not only the burden which the neutral is called upon to bear, but the peril from which, at the price of that burden, it may be expected that belligerent retaliation will deliver him. It may be—let us pray that it may be so—that an Order of this severity may never be needed and therefore may never be justified again, for the right of retaliation is one to be sparingly exercised and to be strictly reviewed. Still the facts must be faced. Can there be a doubt that the original provocation here was as grave as any recorded in history; that it menaced and outraged neutrals as well as belligerents; and that neutrals had no escape from the peril, except by the successful and stringent employment of unusual measures, or by an inglorious assent to the enslavement of their trade? Their Lordships have none.

On the evidence of attacks on vessels of all kinds and flags, hospital ships not excepted, which this record contains, it is plain that measures of retaliation and repression would be fully justified in the interest of the common good, even at the cost of very considerable risk and inconvenience to neutrals in particular cases. Such a conclusion having been established, their Lordships think that the burden of proof shifts, and

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that it was for the appellants to show, if they desired, that the risk and inconvenience were in fact excessive, for the matter being one of degree it is not reasonable to require that the Crown, having proved so much affirmatively, should further proceed to prove a negative and to show that the risk and inconvenience in any particular class of cases were not excessive. Much is made in the appellants' evidence of the fact that calling at a British port would have taken the *Leonora* across a German mine-field, but it is very noticeable that throughout the case the very numerous instances of losses by German action are cases of losses by the action of submarines and not by mines. The appellants filed a series of affidavits, stating in identical terms that in proceeding to a British port of call vessels would incur very great risk of attack by submarines, especially if unaccompanied by an armed escort. Of the possibility of obtaining an armed escort or other similar protection they say nothing, apparently because they never had any intention of complying with the Order in Council, and therefore were not concerned to ascertain how much danger, or how little, their compliance would really involve. Proof of the amount of danger involved in crossing the mine-field in itself is singularly lacking, but the fact is plain that after a voyage of no extraordinary character the *Leonora* did reach Harwich in safety.

Under these circumstances their Lordships see no sufficient reason why, on a question of fact, as this question is, they should differ from the considered conclusion of the President. He was satisfied that the Order in Council did not involve greater hazard or prejudice to the neutral trade in question than was commensurate with the gravity of the enemy outrages and the common need for their repression, and their Lordships are not minded to disturb his finding. The appeals accordingly fail. Their Lordships will humbly advise His Majesty that they should be dismissed with costs.

Solicitors for appellants: *Guedalla & Jacobson, Botterell & Roche.*

Solicitor for respondent: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

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THE HAMBORN.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Ship—Enemy Ownership—Company incorporated in neutral Country—Enemy Control—Flag.

By art. 57 of the Declaration of London the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly. By an Order in Council of October 29, 1914, art. 57 was adopted, but by an Order in Council of October 20, 1915, it was provided that from that date art. 57 should cease to be adopted and that instead Prize Courts should apply the rules formerly observed by them.

A ship captured on October 27, 1915, was owned by a company incorporated in a neutral country whose flag the ship flew and was entitled to fly. The company was entirely under the direction and control of Germans resident in Germany:—

Held, that the ship had been properly condemned as a German ship, whether or not the owners or charterers were ignorant of the Order in Council of October 20, 1915.

Daimler Co. v. *Continental Tyre and Rubber Co.* [1916] 2 A. C. 307 applied.

Decree of the Prize Court affirmed.

APPEAL from a decree of the Admiralty Division (in Prize). (1)

The appellants were a company incorporated according to the laws of the Netherlands and were the owners of the steamship *Hamborn*. They appealed from a judgment of the President (Sir Samuel Evans) condemning that ship as prize on the ground that she was enemy property.

The facts appear from the judgment of their Lordships.

1919. Jan. 16, 17. *MacKinnon K.C.* and *Balloch* for the appellants. The *Hamborn* flew and was entitled to fly the Dutch flag. Unless therefore the Order in Council of October 20, 1915, applies, she was a neutral ship by force of art. 57 of the Declaration of London, adopted by the Order in Council of October 29, 1914. When the ship sailed from New York

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, LORD STERNDALE, and SIR ARTHUR CHANNELL.

(1) [1918] P. 19.

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on October 26, 1915, the appellants did not know of the Order in Council of October 20, 1915. The effect of an Order in Council should be mitigated if the owners send a ship to sea without knowing that the law has been altered. But apart from art. 57 the *Hamborn* ought not to have been condemned. The appellant company was incorporated in a neutral country and is a neutral persona. This is not a case of an enemy taking advantage of a neutral flag, but of a neutral owned ship flying and entitled to fly a neutral flag. Apart from art. 57, the national character of a ship is determined prima facie by the flag: *The Fortuna* (1), *The Vrow Elizabeth* (2), *The Oriental*. (3) In *The Proton* (4) different considerations applied. The evidence did not establish such complete control of the appellant company by enemies as to make applicable the principle laid down in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (5) The two managers of the Transport company were Germans who had resided in Holland since 1913; consequently neither they nor the company were of enemy character: *Janson* v. *Driefontein Consolidated Mines*. (6)

Sir Gordon Hewart A.-G., *Sir Ernest Pollock S.-G.* and *C. R. Dunlop* for the Crown were not called upon.

July 31. The judgment of their Lordships was delivered by

LORD SUMNER. The late President condemned the steamship *Hamborn* upon the ground that she was "a German vessel belonging to German owners." Her owners, the appellants, contend that they are a limited liability company, incorporated in Holland according to Dutch law, and that their ship was on the Dutch register of shipping and that she flew, as well she might, the flag of the kingdom of the Netherlands. Literally all this is true. The President spoke of her as being "nominally" owned by a Dutch company but held that she "must be regarded as belonging to German subjects" and, quoting from *The Fortuna* (7), that "it is no inconsiderable

(1) (1811) 1 Dods. 81.
(2) (1803) 5 C. Rob. 2 and Appx. ii., p. 410.
(3) (1915) 1 Lloyd's P. C. 355, 360.
(4) [1918] A. C. 578.
(5) [1916] 2 A. C. 307, 345.
(6) [1902] A. C. 484, 515.
(7) 1 Dods. 81, 87.

part of the ordinary occupation of a Prize Court to pull off this mask, and exhibit the vessel so disguised in her true character," he laid it down that " the Court is not bound to determine the neutral or enemy character of a vessel according to the flag she is flying, or may be entitled to fly, at the time of capture." In fact, however, in this case there is no mask to be pulled off, if by that is meant some deception to be exposed. The appellant company really is a Dutch company ; the ship was bought before the war and really was the company's property. The company is not shown to be a nominee holding in trust for other persons. There seems to have been no disguise or concealment or attempt to delude either the captors or the Court, and, according to the municipal law applicable, namely that of Holland, the appellants are a Dutch corporation, and the ship is theirs and enjoys the rights and is subject to the obligations which attach to a Dutch ship. Evidently there is some inaccuracy, no doubt inadvertent, in the language employed by the President and on this the appellants' argument is rested.

The facts are these. The appellant company, the Naamlooze Vennootschap Maatschappij Stoomschip Hamborn (or the Hamborn Steamship Company) is a single-ship company and the whole of its shares belong in equal moieties to two other Dutch companies, the Naamlooze Vennootschap Handels en Transport Maatschappij Vulcaan of Rotterdam (or the Transport Company) and the Vulcaan Kohlen Maatschappij, also of Rotterdam (or the Coal Company). As to the Transport Company, all the shares but two, which belong to the German firm of Thyssen & Company of Mulheim on the Ruhr, are the property of a German company, the Gewerkschaft Deutsche Kaiser of Hamborn. The shares of the Coal Company are held exclusively by three companies, the Vulcaan Transport Company above-mentioned and two German companies, the Gewerkschaft Rhein and the Gewerkschaft Lohberg, both of Hamborn. All the directors and shareholders of the last two companies are Germans, resident in Germany. So are the directors of the Vulcaan Transport Company, and they

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have under their supervision and control as managers two Germans, who have resided in Holland since the formation of the appellant company in 1913 and attend to the practical business details of the Vulcaan Transport Company, which in its turn holds the office of manager to the Hamborn Steamship Company. It does not appear that they have any business of their own, and before the appellant company was formed they were clerks employed by the Deutsche Kaiser Company, the one till 1907, the other till 1910.

Sufficient details are given of the ship's regular trade to make it quite clear what she was bought for. Her trade was, with unimportant exceptions, to load ore at Spanish ore ports for Rotterdam, going out with coal from South Wales to French ports to save a ballast voyage. When the war broke out, she was sent across the Atlantic and was trading on time charter there when she was captured. The Transport Company, which owns half the capital of the appellant company, was incorporated to own and manage lighters and tugs for the carriage of cargo up the Rhine and its tributaries, on behalf among others of the Deutsche Kaiser Company, for whom it carries ore. Thyssen & Company and the Deutsche Kaiser Company own ironworks in Germany, and there was not a single person interested in any of these companies at the time of her capture who was not an enemy subject. Their Lordships entertain no doubt that the *Hamborn* was bought and employed as a useful tender to the German iron industry on the Ruhr, that her other trading was ancillary, and that her Dutch flag, Dutch ownership and local management at Rotterdam were adopted merely for the convenience of her German import trade. For some purposes no doubt she belonged to and was counted as part of the mercantile marine of the kingdom of the Netherlands, but in substance she and her trade were a support to and a part of the commerce and the shipping of the German Empire. The legal effect of all this, particularly on her liability to capture, is another matter.

The true question is one, in the President's phrase, of determining the neutral or enemy character of the *Hamborn*. Unless either her Dutch flag or the country of incorporation of the

owning company or the place of residence of her subordinate managers or some or all of these matters be conclusive, she bore a character which justified her condemnation, for she formed part of that enemy commerce which a belligerent is entitled to disable and restrain.

It may be as well to put on one side certain aspects of the effect of using a national flag, which are not now relevant and are really only false analogies. If a ship for her own purposes has assumed and used a national flag to which she is not really entitled, she may in some circumstances be held bound by the nationality which she has thus assumed without warrant. If a ship lawfully flies a national flag, she may in some cases be said, by a figure of speech, to derive from her flag the system of municipal law, by which her contracts or her civil liabilities are governed. In the first case she cannot deny as against captors the national character, which she has irregularly taken; in the second, she derives from the national character, which is actually hers and is indicated by her flag, the system of legal rights and liabilities applicable to her. Neither case touches the position, where in a question with captors it becomes necessary to consider whether the ship, though in contemplation of technical municipal law a neutral ship, of neutral registry, and entitled to the benefits of a neutral flag, is, in the view of the law of nations, a ship of enemy character and liable to be treated in accordance with that character. If the case turned on her user de facto at the time of capture it would be simple: so it would be, if her owners were natural persons of neutral nationality de jure, neither adhering to the enemy nor allowing their chattel to be used in enemy service. The present case is more complex. The criteria for deciding enemy character in the case of an artificial person differ from those applicable to a natural person, since in the nature of things conduct, which is one of the most important matters, can in the former case only be the conduct of those who act for or in the name of the artificial person. It was decided in the case of *Daimler Company* v. *Continental Tyre and Rubber Company* (1) that, in the case of an incorporated company, the right

(1) [1916] 2 A. C. 307.

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and power of control may form a true criterion, the control, that is, of those persons who are the active directors of the company and whose orders its officers must obey, or the control of those persons who in their turn are the masters of the directorate and make or unmake it by the use of the controlling majority of votes. The application of this test presents no difficulty here, for no living person and no sentient mind exercised or possessed any control over the Hamborn Steamship Company, except persons and minds of enemy nationality. The residence of the two German managers in Rotterdam, if not altogether immaterial, at any rate cannot affect the result, since the question is not one of trading with enemy subjects, resident or carrying on business in a neutral country, but is one of the character of an artificial persona, whose trade is carried on for it under the supreme direction and control of enemies born. Their Lordships agree with a passage of the President's judgment, which sufficiently represents the true gist of his reasoning (1) :—"The centre and whole effective control of the business of the Hamborn Steamship Company was in Germany. Having regard to these facts, the vessel must be regarded in this Court as belonging to German subjects," in a claim by captors for condemnation.

One small point remains. By art. 57 of the Declaration of London, varying the rule of international law, the neutral or enemy character of a ship is simply determined by the flag which she is entitled to fly. Down to October 20, 1915, the Crown, by adopting the Declaration of London, had waived its right to rely on other criteria. On that day was published an Order in Council, by which that waiver was withdrawn. The ship was captured on October 27. It is said that the appellant company was unaware of this Order, but its ignorance cannot have the effect of compelling the Crown to continue to waive rights which in truth were in full effect, nor, if knowledge of this kind could matter, would it be the knowledge of the company, which merely owned the ship, but that of the time charterers, who sent her to sea, as to whom nothing is proved.

(1) [1918] P. 25.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

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Solicitors for appellants : *Pritchard & Sons.*
Solicitor for respondent : *The Treasury Solicitor.*

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ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND OTHERS } APPELLANTS;

AND

RITCHIE CONTRACTING AND SUPPLY COMPANY, LIMITED, AND OTHERS } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Vesting of Territory—"Public Harbour"—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *s.* 108.

By s. 108 of the British North America Act, 1867, "the public works and property of each Province, enumerated in the third schedule of this Act, shall be the property of Canada." The schedule includes "public harbours."

"Public harbour," in the above connection, means not merely a place suited by its physical characteristics for use as a harbour, but a place to which on the relevant date the public had access as a harbour, and which they had actually used for that purpose. The date at which the test must be made is the date at which the British North America Act, by becoming applicable, effected a division of the assets between the Province and the Dominion; that date being, in the case of British Columbia, 1871 :—

Held, upon the evidence and applying the above test, that English Bay in the province of British Columbia is not a "public harbour," and accordingly is not the property of the Dominion.

Judgment of the Supreme Court of Canada affirmed.

APPEAL from a judgment of the Supreme Court of Canada (November 2, 1915) affirming a judgment of the Court of Appeal of British Columbia (November 3, 1914), which affirmed the judgment of Macdonald J. at the trial.

The questions raised by the action were whether English

* *Present :* VISCOUNT HALDANE, LORD BUCKMASTER, and LORD DUNEDIN.

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Bay, in the neighbourhood of the city of Vancouver, British Columbia, was a "public harbour" so as to be the property of the Dominion of Canada under s. 108 of the British North America Act, 1867, and Sched. 3 (ii) thereto; and, if so, whether a bank on the foreshore, known as Spanish Bank, formed part of the harbour. A further claim was put forward by the plaintiff, the Attorney-General, by an amendment based upon s. 91, head 10 of the Act. The circumstances in which the questions arose appear from the judgment of their Lordships.

The appeal to the Supreme Court of Canada is reported at 52 Can. S. C. R. 78.

1919. July 21. *Sir John Simon K.C.* and *Newcombe K.C.* for the appellants. English Bay is a "public harbour" within the meaning of sched. 3 referred to in s. 108 of the British North America Act, 1867, and Spanish Bank forms part of it. The word "public" merely excludes harbours to which the public has no access. The word "harbours" signifies places of shelter and is to be distinguished from "ports"; it is not material whether there has been an expenditure of money, nor whether commercial use is made of the harbour. "The Vancouver Island Pilot," compiled from reports made by naval officers in 1858 and 1864, and published by the Admiralty, shows that the physical characteristics of English Bay constituted it a safe anchorage and harbour; and the evidence shows that it was so used before 1871. A broad interpretation should be given to the words "public harbours," and if there is a doubt the decision should be in favour of the Dominion. [Reference was made to *Holman* v. *Green* (1), *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces* (known as the first *Fisheries Case*) (2), *Kennelly* v. *Dominion Coal Co.* (3), *Attorney-General of Canada* v. *Kelfer* (4), and *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (5)] Further, "navigation and shipping" being a subject entrusted to the Dominion by s. 91, head 10, the Government was entitled and

(1) (1881) 6 Can. S. C. R. 707. 495, 500.
(2) [1898] A. C. 700.
(3) (1904) 36 Nova Scotia Rep.
(4) (1889) 1 Brit. Col. Rep. 368.
(5) [1906] A. C. 204, 209.

bound to prevent dredging operations which were calculated to affect navigation.

Farris K.C. (Attorney-General for British Columbia), *Geoffrey Lawrence* and *O. C. Bass* for the respondents, were not called upon.

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LORD DUNEDIN. The respondents, the Ritchie Contracting and Supply Company, were, with the licence of the Government of British Columbia, whose Attorney-General is the second respondent, removing sand from a bank on the foreshore of the sea known as Spanish Bank, situated at the entrance to English Bay. English Bay is the bay which forms the outer approach to Burrard Inlet, which leads to the city of Vancouver. The appellants, the Attorney-General for the Dominion of Canada and the Vancouver Harbour Commissioners, brought this action to restrain the respondents from removing the sand. The main ground on which the action was based was that English Bay was a public harbour and Spanish Bank a part thereof; that in virtue of s. 108 of the British North America Act the solum of the bank belonged to the Dominion; and that the operations of the respondents thereon were consequently unauthorized and illegal. There was a second and subsidiary ground of action which will be more particularly specified hereafter.

The case was tried before Macdonald J., who decided against the appellants and dismissed the action. Appeal being taken to the Court of Appeal of British Columbia, that judgment was affirmed unanimously by five judges. Appeal again being taken to the Supreme Court of Canada, the judgment was again affirmed unanimously by six judges. The appellants have, therefore, a most formidable weight of judicial opinion against them; but on appeal to this Board they contended that, although all the judges were against them, the grounds of judgment of various of the learned judges were different, and that the unanimity was more apparent than real. There are cases where opinions which agree in result yet differ so in substance as to be incapable, so to speak, of living together.

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On the other hand, if a plaintiff to obtain the relief he asks must prove affirmatively two or more propositions, it follows that a learned judge who bases his opinion on the fact that, in his view, the plaintiff has failed to prove proposition A is not necessarily in conflict with another learned judge who bases his judgment on a failure to prove propositions B or C. Their Lordships think that on examination the present case will be found to fall within this second category.

The first proposition which the appellants are bound to prove is that English Bay is a public harbour, for English Bay is admittedly situate within the province of British Columbia, and, in virtue of s. 109 of the British North America Act, which necessarily speaks as at the date of the admission of British Columbia to the Union, namely, in 1871, belongs to the Province, unless it can be shown to be transferred by some other section to the Dominion. The only section appealed to is s. 108, with its concomitant Schedule No. 3, one item whereof is "public harbours."

It may be as well first to see how the decided cases which may be thought to deal with the question stand. There are many cases referred to in the opinions of the learned judges in the courts below where the subject has been more or less approached, but their Lordships think it necessary to refer to only two. They are *Holman* v. *Green* (1), decided in the Supreme Court of Canada, and the first *Fisheries Case* (2) before this board. *Holman* v. *Green* (1) had to do with Summerside Harbour. In that case it was contended that the term "public harbours" only extended to such harbours as had had public money expended on them and could not include natural harbours. That contention was repelled, but some expressions were used which would lead to the conclusion that each and every piece of land within the ambit of the harbour over which the tide flowed was transferred in property. Accordingly, when this Board came to deal with the subject in the *Fisheries Case* (2), they said as follows: "It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green* (1) that if more than the public

(1) 6 Can. S. C. R. 707. (2) [1898] A. C. 700, 712.

works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water mark, being also Crown property, likewise passed to the Dominion. Their Lordships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it."

They had previously stated on the general question that it would be, they thought, extremely inconvenient that a determination should be sought of the abstract question: What falls within the description "public harbour"? They declined to attempt an exhaustive definition of the term applicable to all cases. It must depend, they said, to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour.

Their Lordships are bound to say that the expression, "What falls within the description of public harbour" used in that passage has been liable in some cases to misconstruction. In the case of *Holman* v. *Green* (1), the Court was dealing with a harbour which was an admitted harbour. Accordingly, the expression, "What falls within the description of public harbour," used as it was in commenting upon the case of *Holman* v. *Green* (1), means—given the existence of a public harbour—what territory falls within it, and does not mean what class of harbour is meant by the expression "public harbour." None the less, however, the words used as to each case depending on its own circumstances may well, as is pointed out by Macdonald J., be also used in regard to the question of determining what is and what is not a public harbour. The extreme view one way, namely, that a public harbour only meant such a harbour and such portions of it as had been

(1) 6 Can. S. C. R. 707.

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the creation of public money, was rejected, and rightly rejected, in *Holman* v. *Green* (1); the extreme view the other way, namely, that every indentation of the coast to which the public have right of access, and which by nature is so sheltered as to admit of a ship lying there, is a public harbour, has been argued by the appellants in this case and rightly, as their Lordships think, rejected by all the learned judges in the courts below. Potentiality is not sufficient; the harbour must be, so to speak, a going concern. "Public harbour" means not merely a place suited by its physical characteristics for use as a harbour, but a place to which on the relevant date the public had access as a harbour, and which they had actually used for that purpose. In this connection the actual user of the site both in its character and extent is material. The date at which the test must be applied is the date at which the British North America Act, by becoming applicable, effected a division of the assets between the province and the Dominion. That in this case is 1871. Applying this test to English Bay, their Lordships agree on the facts with the great majority of the learned judges below, who hold that English Bay is not a public harbour. Nor, as already pointed out, are the remaining judges of an opposite opinion. Some of them prefer to rest their decision on the view that, even supposing English Bay to be a public harbour, Spanish Bank, in accordance with the views of this board in the *Fisheries Case* (2), would be within the ambit, but not a part of it. As their Lordships hold that English Bay is not a public harbour, it is unnecessary to consider this question, though their Lordships indicate no opinion contrary to those of the learned judges below.

This disposes of the main point of the case; but the appellants obtained leave to amend their original pleadings by adding this statement: "The Attorney-General of Canada moreover alleges and submits that, whether English Bay within the area hereinbefore described be or be not a public harbour, the defendants, the Ritchie Contracting and Supply Company, Limited, and Purvis E. Ritchie, have not, and never had, any title, right or authority to remove the sand, gravel

(1) 6 Can. S. C. R. 707. (2) [1898] A. C. 700.

or other material naturally forming the bed or foreshores of the said bay, and that the Attorney-General of British Columbia has not, and never had, any right, authority or jurisdiction to authorize the removal of any part of the said bed or foreshores or interference therewith. The Attorney-General of Canada avers on the contrary that, the waters of English Bay within the limits hereinbefore described being navigable waters of the sea, it was and is the duty of the Crown, in so far as it is represented locally, to maintain the bed and foreshores of the said waters in their natural state and to prevent waste of the sea. The Attorney-General of Canada claims a declaration of this honourable Court in the terms of this paragraph, and moreover, an injunction to restrain further waste."

The appellants argued that their title to object flowed from the fact that navigation is one of the subjects entrusted to the Dominion under s. 91 of the British North America Act.

It has often been pointed out that the domain of legislation is quite a different matter from proprietary rights. It may, however, be assumed for the purposes of this argument that if what was being done could be shown to be a danger to navigation the right of the Dominion to make navigation laws would give a sufficient title to object. The hypothesis of the situation is that the Province is, in taking away the sand, operating in suo. Any restraint upon that at the instance of the other party must consist of an injunction of the quia timet order. But no one can obtain a quia timet order by merely saying " Timeo " ; he must aver and prove that what is going on is calculated to infringe his rights. In the present case there is no averment of a specific character, far less proof, that what is being done at Spanish Bank will affect navigation in the slightest degree. This point, therefore, also fails.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants : *Charles Russell & Co.*
Solicitors for respondents : *Gard, Lyell, Betenson & Davidson.*

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August 1.

[PRIVY COUNCIL.]

GOVERNORS AND COMPANY OF ADVENTURERS OF ENGLAND TRADING INTO HUDSON'S BAY . . . . . } Appellants;

AND

COUNCIL OF THE RURAL MUNICIPALITY OF BRATT'S LAKE, AND OTHERS . . . . . } Respondents.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Canada (*Saskatchewan*)—*Taxation of Land*—*Rural Municipality*—*Surtax*—*Validity*—"*Exceptional Tax*"—*Rural Municipality Act* (*R. S. Sask.* 1906, *c.* 87), *s.* 323(*b*).

By an agreement made with the Crown, and authorized by an Imperial statute, no "exceptional tax" was to be placed upon the lands of the appellant company.

Under s. 323(*b*), added to the Rural Municipality Act (R. S. Sask., 1906, c. 87), by ch. 31 of the 1912-13 Saskatchewan statutes, there was imposed by each rural municipality in that province upon land therein a surtax of 6¼ cents per acre in addition to the uniform land tax upon the assessed value of the land imposed by s. 250. Owners of less than 1920 acres in a municipality who resided on or cultivated a certain proportion of their land were exempted from the surtax. Owing to the size of the holdings of the appellant company in the various municipalities, and the nature of their occupation, they were charged with a proportion of the whole surtax far larger than if it had been imposed uniformly:—

Held, that the surtax was not an "exceptional tax" within the meaning of the agreement.

Held, further, that the surtax was validly imposed, although under the above-mentioned Act there had been levied a uniform tax to cover the estimated expenditure for the year, and the surtax was not allocated to any particular municipal expenditure.

Judgments of the Court of Appeal affirmed.

APPEALS from a judgment of the Court of Appeal for Saskatchewan (December 21, 1918), affirming the judgment of Lamont J., and (in the connected appeal) reversing the judgment of Brown J.

* *Present:* THE LORD CHANCELLOR, VISCOUNT HALDANE, LORD BUCKMASTER, LORD PARMOOR, and MR. JUSTICE DUFF.

The question at issue in the principal and in the connected appeal was whether the respective appellants were liable to pay a tax of $6\frac{1}{4}$ cents per acre, called a surtax, charged against their respective lands by rural municipalities in the province of Saskatchewan under s. 323 added to the Rural Municipality Act (R. S. Sask., 1906, c. 87) by ch. 31 of 1912-13, and amendments thereto.

In the principal appeal, by arrangement with the Attorney-General of the Province, the respondent municipalities (1), being six of those interested, brought actions for recovery of the surtax. The six actions were consolidated, and one defence was filed to them. Lamont J., the trial Judge, and the Court of Appeal held that the appellants were liable.

In the connected appeal, the respondents, the council of the rural municipality of Snipe Lake, had sued the appellant, J. E. Martin, to recover the surtax. Brown J., the trial Judge, dismissed the action; the Court of Appeal, who delivered judgment in the appeal together with their judgment in the appeal by the Hudson's Bay Company, reversed the judgment of Brown J.

The arguments for the appellants in the present appeals were heard consecutively, the grounds of objection to the surtax in the case of the Hudson's Bay Company including those in the case of Martin.

The facts sufficiently appear from the judgment of their Lordships.

1919. July 4, 7. *Sir John Simon K.C.*, *Wallace Nesbitt K.C.*, *S. J. Rothwell K.C.*, *Bischoff* and *C. C. Robinson* for the appellants the Hudson's Bay Company; *J. A. Allen K.C.* and *P. H. Gordon* for the appellant Martin. The surtax was an "exceptional tax" within the meaning of the deed of surrender; it consequently could not be imposed upon the appellants, the Hudson's Bay Co. It was exceptional in its nature, in that it was not a part of the general municipal levy, but something in addition to it and an unusual

(1) The respondent rural municipal councils were those of Bratt's Lake, Redburn, Chaplin, Abernethy, Craik and Nipawin.

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tax. It was also exceptional in its incidence upon the company's land. In many of the municipalities the company were the only owners upon whom the tax fell, or who could not obtain exemption by cultivating or residing on the land. In the aggregate the company was called upon to pay about one-sixth of the whole surtax throughout the province, while if it had been uniformly imposed they would have been liable for about one-twenty-eighth only. Further, the surtax was not within the provincial powers of taxation given by s. 92, head 2, of the British North America Act, 1867—namely, direct taxation "in order to the raising of a revenue for provincial purposes." It is the duty of a municipal council under s. 294 of the Rural Municipality Act (R. S. Sask., 1909, c. 87) to make an estimate of all expenditure for the current year, and under s. 295 to meet that expenditure by a uniform rate of tax. The surtax, not being specially allocated to any particular municipal purpose, was not validly imposed as a surtax, and was not imposed "in order to the raising of revenue for provincial purposes." The so-called surtax is not, in the terms of s. 323 (*b*), "in addition to" taxes already provided for, but is an unequal imposition levied upon certain landowners for the relief of the payers of land tax in the municipality. [Reference was made to *McGowan* v. *Hudson's Bay Co.* (1)]

The Board desired to hear the respondents' counsel only as to the contention that the surtax had not been validly imposed having regard to the provisions of the Rural Municipality Act.

Hon. F. Russell K.C., *P. M. Anderson K.C.* and *Northcote* for the respondents in both appeals. On a consideration of the whole Act it appears that the Council, in settling the probable expenditure, have before them revenues other than the proceeds of a uniform rate which is to be struck under s. 295. The surtax is taken into account in making up the general estimate and levy. The fact that the surtax legislation was enacted after the Rural Municipality Act shows that it was

(1) (1904) 5 Terr. L. R. 147, 156.

not intended that the power to tax under that Act should embrace the whole taxing power of the municipality.

Aug. 1. The judgment of their Lordships was delivered by

LORD PARMOOR. These are appeals from the Court of Appeal for the province of Saskatchewan. In the Hudson's Bay Company's appeal there are six respondents, but the same main questions arise in each case. It is, however, argued on behalf of the appellants that somewhat different considerations are raised in the case of those rural municipalities in which the burden of the surtax falls exclusively, or almost exclusively, on the appellant company.

In the year 1670 Letters Patent were granted by King Charles II. to certain persons incorporated by the name of the appellant company, whereby certain lands and territories, rights of government and other rights, privileges, liberties, franchises, powers and authorities, were granted to the company in His Majesty's Dominion in North America. By the British North America Act, 1867, provision was made for the admission of Rupert's Land and the North-West Territories or either of them, into the Union on certain specified terms and conditions. In 1868 the Rupert's Land Act was passed, and, for the purpose of that Act, the term Rupert's Land was defined to include the whole of the lands and territories held or claimed to be held by the appellant company. Under the provisions of that Act a surrender was made and duly accepted by Her Majesty Queen Victoria by an instrument under her sign manual and signet, on June 22, 1870. On the following day an Order in Council was issued declaring that Rupert's Land should from and after the said date be admitted into and become part of the Dominion of Canada upon the terms and conditions therein specified. It is not necessary to follow the further history, except to state that Saskatchewan and Alberta were created as Provinces of the Dominion in the year 1905. Clause 11 of the deed of surrender is as follows: "The company is to be at liberty to carry on its trade without hindrance in its corporate capacity, and no exceptional tax is to be placed upon the company's land, trade or servants, nor any import duty on

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goods introduced by the said company previously to such acceptance of the said surrender."

The appellants submit that the tax, sought to be imposed upon them, is an exceptional tax within the meaning of the said clause, both in its nature and in its incidence, and that they are therefore exempted from liability to such taxation. They further submit that in any case the tax is not effectively imposed, as there was no specific application or appropriation of the moneys when levied and collected, and further that the moneys were not required for municipal purposes, since all the requirements of the municipality were met by the ordinary taxation to be levied under the Rural Municipality Act, R. S. B. C., 1909, c. 87.

The Rural Municipality Act constitutes municipalities which, so far as practicable, comprise an area of 18 miles square, and the respondents are the councils of various rural municipalities in Saskatchewan. The council of each municipality is constituted a body corporate, and is directed to appoint an assessor, whose duty it should be to make an assessment of the municipality in the manner provided. The appellants rely on s. 250 (*a*), which enacts that all municipal taxes shall be levied equally upon all rateable land in the municipality, according to the assessed value of such land. This section contains a declaration of the principle of equality where rates are levied on the assessed value of land, and has no direct application to the tax in question in this appeal. Sect. 294 provides for the preparation of estimates of the probable expenditures of the municipality for the year; s. 295 for the levy of the rate, and s. 296 that the uniform rate of taxation to be authorized by the council shall not in any one year exceed one per centum of the assessed value of the land. The tax from which the appellant company claim exemption is levied as a surtax, under a series of sections headed Surtax Provisions. Sect. 323 (*b*) enacts that in addition to the tax assessed under the provisions of s. 252 thereof it shall be the duty of the council of every rural municipality, and it shall have power to annually assess, levy and collect a tax of $6\frac{1}{4}$ cents per acre, called a "surtax," on all lands within the municipality made subject to the same as thereinafter set forth. It was urged

on behalf of the appellant company that the words " in addition to " implied that the surtax should not be levied except so far as was necessary to supplement the ordinary taxation on assessed values, but, for reasons hereafter given, their Lordships cannot accept this construction. There is a provision that the land of any person who owns or occupies not more than forty acres in the municipality shall be exempt. Subject to this exemption, the land of any owner or occupant exceeding 1920 acres, and the land of any owner or occupant of a less quantity which does not comply with specified conditions as to the area under cultivation, or residence, is subject to the tax, which is at a flat rate uniformly imposed on acreage. The provisions of the Act respecting the assessment and levy of municipal taxes are applied to the said surtax in the same manner, and to the same extent, as if the surtax were part of the general municipal levy, and for this purpose the said surtax roll is to be deemed to be and to be taken as a part of the assessment and tax roll of the municipality.

In 1914, when the surtax was first levied, there were 294 rural municipalities in Saskatchewan, of which 274 were in the fertile belt. The surtax was levied in 271 of these rural municipalities. In the case of the rural municipality of Chaplin the appellant company own 8839 acres. There were 549 taxpayers on the assessment roll, but all other land, except that of the appellant company, was exempt from tax either through residence or cultivation. There are 12 other rural municipalities in which the appellant company's land is the only land subject to the surtax. In the case of Nipawin the appellant company own 10,818 acres. There were 561 taxpayers on the assessment roll but only one other person, besides the appellant company, was charged with a surtax. In the rural municipality of Craik there were 565 taxpayers on the assessment roll, and four other persons, besides the appellant company, were charged with the surtax. In the rural municipality of Abernethy there are 457 taxpayers on the assessment roll, but only 22 persons on the surtax roll. In Redburn there are 592 owners on the roll, and 21 are charged with surtax. In the rural municipality of Bratt's Lake the appellant company is charged as the owner of 480

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acres. There are 483 persons on the assessment roll and 49 on the surtax roll. The conditions in the respondents' councils as selected are said to be fairly illustrative of the general conditions in all the rural municipalities in Saskatchewan. In the aggregate, 1,778,844 acres of land belonging to the appellant company are charged with the surtax. There is no doubt, therefore, of the importance of the questions raised in this appeal by the appellant company.

The question mainly argued on behalf of the appellant company before their Lordships, was whether the appellant company is exempted from the surtax under the terms of clause 11 of the deed of surrender. The first provision of this clause is that the "Company is to be at liberty to carry on its trade without hindrance in its corporate capacity." It was argued that this provision showed the wide character of the intended exemption but, apart from any bearing that this provision may have in determining the general construction of the clause, it is not possible to say that the surtax, in itself, is any interference with the liberty of the appellant company to carry on its trade in its corporate capacity. The second provision is the important one, "No exceptional tax is to be placed upon the company's land, trade, or servants." It is claimed that the surtax is exceptional either in its nature, or in its incidence, or both in its nature and incidence. No doubt the surtax was not a tax in force when the deed of surrender was executed, but at that date there were no taxes levied in the territory of Saskatchewan, and, if the test of novelty is applicable, it would mean that the appellant company would be exempt from all taxes rendered necessary by progressive advance within the territory. In other words the clause would give exemption from all taxes. Their Lordships are unable to accept any such wide interpretation of the terms of the deed, or to hold that the language denotes any such far-reaching exemption. It was, however, further argued that if novelty in taxation was not sufficient to bring the surtax within the term "exceptional," as used in the deed of surrender, yet that the surtax was of so unusual a character, either in its nature or incidence, or both in its nature

and incidence, as to be fairly comprised within that term. It was urged that the surtax was neither uniform nor equal, and that its non-compliance with the principles either of uniformity or equality brought it within the category of an exceptional tax. No doubt there is discrimination between owners and occupants who are residents or non-residents, between owners and occupants of a large or small acreage, between owners and occupants who do or do not cultivate a certain proportion of their holdings, and this discrimination does, on the facts as they exist, throw in an especial manner the burden of the surtax on the appellant company. At the same time, the surtax may be said to be both uniform and equal having regard to the fact that it is imposed not on value but on acreage. There is a uniform flat rate of $6\frac{1}{4}$ cents per acre, subject to exceptions of a uniform character to which all owners and occupants are entitled without discrimination, provided that they fulfil the specified conditions. The conditions imposed have the effect of throwing a heavy burden on the appellant company as compared with other ratepayers, in rural communities such as Chaplin and Nipawin, but this is the result of the large acreage of the holdings of the company and not of any distinction between the position of the appellant company and that of any other company or person. The real complaint appears to be to any system of taxation not based on assessed values, and in which the principle of discrimination is sanctioned, but their Lordships are of opinion that such a system of taxation is within the powers and discretion of the councils of the rural municipalities, and that if such a system is adopted and applied generally, the appellant company cannot claim to be entitled to special exemption under the terms of the deed. Different considerations would arise if it could be said that the appellant company had been singled out to bear a special burden of taxation from which other members of the community in a similar position are exempt, but the surtax in question is not open to this criticism and no such case has been established. Mr. Nesbitt used an additional argument. He said that the term in the deed was intended to protect the appellant company against any system of taxation which would place it at a dis-

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advantage in competition with small retail dealers. To adopt this construction would be to introduce words into the exemption clause which are not there, and to open a wide range of discussion in each case. As a matter of fact a purchaser of land from the appellant company would, as regards the surtax, stand in exactly the same position as a purchaser from any other company or person, whether such other company or person is a small or large owner of land. It is further of importance to note that the exceptional tax is a tax applicable not only to the company's land but also to the company's trade and servants. It could not be said that a servant of the company, if also an owner or occupant of land within a rural community, and subject as such to the surtax in common with other owners or occupants in a similar position, was subject to an exceptional tax. The last provision in the exemption clause, which prohibits any import duty on goods introduced by the company previously to the acceptance of the surrender, has no application to the surtax in question, and does not affect the construction of the preceding provisions. Their Lordships are of opinion that the appellant company have not established the case that the surtax in question is an exceptional tax from which they are exempt under the terms of the deed of surrender.

In the second place the appellant company contended that the surtax was not validly imposed as there was no application or appropriation of the moneys to be levied, and further that the moneys were not required for municipal purposes, as all the requirements of each municipality were or should be met by moneys levied by ordinary municipal assessment and taxation under Pt. VII. of the Rural Municipality Act, R. S. B. C., 1907, c. 87. In the absence of evidence to the contrary it must be presumed that the surtax is levied for legal purposes. Sect. 323 (*i*) in the statute applies all the provisions of the Rural Municipality Act respecting the assessment levy and collection of municipal taxes to the surtax in the same manner and to the same extent as if such surtax were part of the general municipal levy, and for these purposes the surtax roll is to be deemed to be taken as part of the assessment and tax roll of the munici-

pality. It is not suggested that there has been any irregularity in procedure, and under these circumstances it is difficult to see in what way the question of the use of the proceeds of the surtax by the municipal council has any bearing on the case of the appellants, or takes away from the municipality any right of action which apart from this consideration it would otherwise possess. The whole case, however, of the appellant company on this point rests on a misunderstanding of the scheme of taxation comprised in the taxing Act. The surtax is a tax which it is the duty of the council of any rural municipality annually to assess, levy and collect on all lands within the municipality subject to the tax, and is to be in addition not to any amounts levied or collected under the provisions of s. 252, but to the tax itself. This does not mean that the surtax is to be regarded as a supplementary source of revenue and only to be levied so far as there may be deficiency in the amount levied under s. 252, but that it is to be an additional tax levied annually, so that the amount raised so far as it is applicable, may be paid into the general municipal account on the credit side. The estimates to be prepared under s. 294 are simply normal estimates of probable expenditure of the municipality for the year, and the levy under s. 295 upon all lands entered on the assessment roll at a uniform rate on the dollar is of such an amount as shall be deemed sufficient to meet the estimate of expenditure. The sufficiency of the amount would depend on the extent to which any moneys had been placed to the credit of the municipality from whatever source, and one source would be any moneys which had been so credited as the result of the collection of the surtax. Sect. 296 provides that the uniform rate of taxation to be levied under s. 295 shall not exceed one per centum of the assessed value of land, an indication that this source of taxation might not in all cases meet the municipal expenditure. There is no warrant for the assumption that all the requirements of a municipality are to be met by the power to tax on assessed values contained in the assessment roll, and unless this assumption can be maintained the argument of the appellant company fails. Sect. 250 (*a*) only applies to taxes levied upon the rateable

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value of lands according to the assessed value of such lands, and does not affect the duty of the council of the municipality annually to assess, levy and collect a surtax under s. 323 (*b*). In the opinion of their Lordships the contention of the appellant company under this head of its appeal fails, and the appeal must be dismissed.

The appeal of *Martin* v. *Council of the Rural Municipality of Snipe Lake, No.* 259, raises the contention, raised in the appeal of the Hudson's Bay Company, that the surtax legislation did not effectively impose the surtax. The same considerations arise and the same result follows. The appeal must be dismissed.

Their Lordships will humbly advise His Majesty that both of the above appeals should be dismissed with costs.

Solicitors for appellants: *Bischoff, Coxe, Bischoff & Thompson; Blake & Redden.*

Solicitors for respondents: *Collyer-Bristow & Co.*

END OF VOL.